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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 177

VINCENT CICENIA, PETITIONER

vs.

R. WILLIAM LAGAY, SUPERINTENDENT OF NEW JERSEY STATE PRISON FARM AT RAHWAY, NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1957

CERTIORARI GRANTED JUNE 10, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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A In United States Court of Appeals for the Third Circuit

No. 12011

IN THE MATTER OF THE APPLICATION OF VINCENT CICENIA FOR A WRIT OF HABEAS CORPUS

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix for appellant

Filed September 8, 1956

DICKINSON R. DEBEVOISE,
744 Broad Street, Newark 2, New Jersey,
Attorney for Appellant.

[File endorsement omitted.]

3 In United States District Court

Application for writ of habeas corpus

Filed April 2, 1956

APPLICATION

"Under the Constitution of the United States, and the New Jersey State Constitution, Appellant urges the Writ in the instant case issue.

"Appellant alleges that his Rights under both Constitutions have been violated, and that he is being imprisoned and detained illegally, and the Writ should issue for the factual evidence embodied herein."

The Application of Vincent Cicenia, Appellant Herein, Respectfully Shows:

1. That he is being imprisoned and detained at the New Jersey State Prison Farm at Rahway, New Jersey.

2. The cause or pretense of my present confinement and restraint according to the best of my knowledge and belief is a

judgment issued by the late, Honorable Joseph E. Conlon, Judge of the Essex County Court, Newark, New Jersey, on April 18th, 1951, upon my conviction, by a plea of "Non Vult" for the crime of Murder.

STATEMENT

For a twenty-six hour period, commencing at 9:00 A. M. December 18th; 1949, until 11:00 A. M. December 19th; 1949, I was held under unlawful arrest, without a warrant, without an advisement of the reason for such restraint and arrest.

Factual Happenings Prior to My Illegal Arrest, Are as Follows:

On December 17th; 1949, the Orange Police visited my home and left word with my parents for me to call at Police
4 Headquarters the next day. On December 18th; 1949, at 9:00 A. M. I went to the Orange Police Headquarters and was immediately placed in custody. Two Detectives from Newark, removed me from Orange Police Headquarters, and brought me to the Police Headquarters in the City of Newark. I was put in a cell, and remained there from 10:00 A. M. to 1:00 P. M. on the above date. At 1:00 P. M. or soon thereafter, I requested permission to call my Attorney, they, the Detectives, denied my request, I asked to be permitted to contact my family, or someone who would investigate and ascertain the reason for my arrest, again my request was denied. At this time, I was taken from the cell I occupied, and taken to an average size room where I was questioned and "mistreated" until 7:45 P. M. that evening, at which time Appellant was in awful pain and totally exhausted. At 8:00 P. M. a Prosecutor's Detective informed me that he wanted me to sign a prepared written "Statement". I said, "I will not answer any more questions, and I will sign no papers, and if this continues it will have to be with the presence of my Attorney. In reply, the Prosecutor's Detective lied to me and swore that my Attorney was not present, (when in actuality my Attorney was outside the room, and had been arguing to see me "his Client" since 2:00 P. M. that day), and that "we'll try to get in touch with him for you as soon as we get this over". Some time after 8:00 P. M. County Detectives started to write an

alleged "Statement" of "Confession". Present at the time were representatives of the City and County Police, and an Assistant Prosecutor of the County. When the "Statement" was complete, a "disinterested witness" entered the room, whereupon the Detective who had written the "Statement" told me to sign on the line. This time I demanded the right to consult with my Attorney. The right of Counsel during the "interrogation" was denied in the instant case. The Police Officials of both City and County lied to me, I was told several times my Attorney could not be reached. (Actually, my Attorney, Mr. Frank A. Palmieri, 347 Main Street, Orange, New Jersey, has spoke to Assistant Prosecutor McKeown, at 4:46 P. M. insisting upon being permitted to see and speak with me, his Client; also demanding to be properly informed as to whether or not, I was being held by virtue of a warrant; Mr. McKeown dileberately mis-informed my Attorney by stating, I was being held under a warrant. At no time was there a legal summons, complaint or warrant served upon me from the time of my arrest at 9:00 A. M. December 18th; 1949, until my Arraignment on December 19th; 1949, at 11:00 A. M. At no time did I have the benefit of independent legal advice. I was not advised by the Police or the Assistant Prosecutor, that under the law of the land I was not required to make a statement, nor was I advised that any statement made during such an "improper interrogation" might be used against me during a subsequent prosecution on criminal charges, and only after acceding to the threats, intimidations and physical abuse of the Police Officers and Assistant Prosecutor, was I permitted to see and speak with Counsel. Appellant maintains his present incarceration to be illegal, and for the record, hereto annexed, this Court will note, Three Sworn Affidavits.

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3. Of Vincent Cicenia 28

Counsel, Mr. Palmiere, made Application to see and examine the "alleged" statement of confession I was compelled to sign and attest to in the "interrogation room" on December 18th; 1949, but was denied the privilege of doing so; it being decided, that such "statement confession" would be acted upon by the

trial Judge. After a twelve month passage of time, my Attorney, strongly advised a plea of Non Vult be entered to the Indictment, and at a later date, he, Counsel, would institute an appeal, and that upon such appeal, he would be able to see and examine the "statement confession" and establish the fact that same was mulcted from me by threats and brutality, and was in reality a forced statement, forced testimony, an outstanding violation of my Constitutional Rights under the Constitution of the United States and the New Jersey State Constitution.

Attorney in the instant case stated, and I quote, "I will base the appeal on the following violations:

"1. That I was illegally imprisoned, detained without a valid commitment order signed by a Magistrate, or Judge; thereby deprived the rightful protection of the Court, violative of the prerequisites of the laws of the State of New Jersey, and the Rules of their Courts.

"2. That I was placed and maintained under unlawful arrest for a period of twenty-six hours by the Newark Police and the Assistant Prosecutor of Essex County, without a warrant or summons of any nature.

7 "3. That I was denied the privilege of summoning assistance, such as, family, friends, or suitable Counsel to abet me during a period of severe mental and physical anguish occasioned by the aforesaid Police and Assistant Prosecutor.

"4. That I was compelled, after long hours of improper and illegal interrogation, to affix my signature to a 'prepared statement confession' wherein I was 'allegedly' admitting complicity in a crime of Murder, a capitol offense under the laws of the State of New Jersey."

I am most cognizant this Court will note the violations and abuses herein alleged, and will not sanction that such is to prevail; also knowing, in truth, that the records will substantiate the allegations made by Appellant in this Application.

Under the 14th; Amendment of the Federal Constitution, each and every Citizen of the United States must be afforded the full, and equal, and unhindered processes of the law, where an immunity or a means for relief is extended, all shall have eligibility for any benefit thereunder.

As stated earlier, I am mindful that my present imprisonment and restraint is illegal, by reason of the fact that the Essex County Court, the late Joseph E. Conlon, Judge presiding, was without proper jurisdiction, insofar as the original restraint and control was illegal and improper, violative of the provisions of the law and that all subsequent proceedings were thereby null and void.

Affidavit of pauper

Filed April 2, 1956

HONORABLE SIR: Attached your Honor will find application requesting the assignment of Counsel, plus, application for the issuing of the Writ of Habeas Corpus.

8 Being a layman and not familiar with the proper procedure in the filing of an application of this nature, I most respectfully urge your Honor to consider my application as is prepared, and not dismiss for improper procedure.

In closing I extend my heartfelt thanks for this Courts consideration in regard to attached application.

Very respectfully yours,

VINCENT CICENIA.

Application for the assignment of counsel to represent appellant with attached matter.

Appellant being without funds and only a smattering amount of legal knowledge respectfully urges this Honorable Court to assign suitable counsel so he may be guided properly.

Respectfully submitted.

VINCENT CICENIA.

Vincent Cicenia, being duly sworn according to law, upon his oath deposes and says:

"1. That he is the appellant in the attached application and is without the slightest smattering of legal knowledge and does not have funds to retain suitable Counsel to prosecute attached appeal.

9 "2. That he is now confined in the New Jersey State Prison Farm at Rahway, New Jersey, and that he is indigent in that he has no funds in the bank, nor any other

funds from which he could defray the cost of pursuing his appeal, paying the customary filing fees and etc."

Therefore, your appellant prays this Court will assign Counsel so the proper laws and citations may be submitted to substantiate the claims advanced.

Vincent Cicenia, being the same person in the attached application, is of full age, a citizen of the United States, being duly sworn according to law, upon his oath deposes and says:

"I have read the foregoing facts, and the same are true and correct to the best of my knowledge and belief."

Vincent Cicenia,
VINCENT CICENIA, *Pro Se.*

Sworn and subscribed to before me this 17th day of January 1956.

My commission expires February 25, 1958.

CLAYTON BLACKBURN,
Notary Public of New Jersey.

In the United States District Court

Order for writ

April 2, 1956

Upon reading the petition of Vincent Cicenia and being of the opinion that good cause is shown therefrom why this order should be entered;

It Is on this 2nd day of April, 1956, Ordered that a writ of habeas corpus issue out of this court directing the production of the body of Vincent Cicenia before this Court at the Federal Building, Trenton, New Jersey, on Tuesday, April 24, 1956, at ten o'clock in the forenoon; and

It Is Further Ordered, that R. William Lagay, Superintendent of the New Jersey State Prison Farm, Rahway, New Jersey, by whom the said Vincent Cicenia is imprisoned and detained, make a return certifying the true cause of detention and otherwise comply with Section 2243 of Title 28 of the United States Code; and

It Is Further Ordered, that copies of the petition of Vincent Cicenia for a writ of habeas corpus (exclusive of pages 17

through 70 thereof constituting an appendix thereto), of this order and of the writ of habeas corpus to be issued pursuant hereto, which copies may be certified as true copies by the attorney for the petitioner, be served upon the Attorney General of the State of New Jersey and upon the Prosecutor of Essex County within four days from the date hereof by mailing such copies to such officials, postage prepaid and return receipt requested; and

It Is Further Ordered, that the writ of habeas corpus to be issued pursuant hereto and copies of the said petition of Vincent Cicenia (exclusive of pages 17 through 70 as aforesaid) and of this order, which copies may be certified as true copies, by the attorney for the petitioner, be served upon R. William Lagay, Superintendent as aforesaid within four days from the date hereof; and

It Is Further Ordered, that the said Vincent Cicenia be given leave to prosecute the within action in forma pauperis.

FORMAN,
U. S. D. C. J.

11 In the United States District Court

Stipulation re record and facts

Filed April 18, 1956

It is hereby stipulated by Dickinson R. Debevoise, attorney for petitioner, and by Charles V. Webb, Jr., Essex County Prosecutor and Attorney for Respondent, as follows:

1. The record in this application shall include the following:

a. Indictment; Notice of Motion for Order to produce and for suppression of confession; Affidavit of Frank A. Palmieri; Affidavit of Thomas Cicenia; Affidavit of Vincent Cicenia; Memorandum by the Court dated March 23, 1950; Order dated April 6, 1950 denying the aforementioned Motion for Order; Notice of Appeal from the aforementioned Order; Opinion of Appellate Division; Judgment of and Mandate on Dismissal of Appeal; Notice of Appeal to Supreme Court of New Jersey; all as set forth in the Appen-

dix to Appellant's Brief submitted to the Supreme Court of New Jersey in the case of State of New Jersey v. Vincent Cicenia.

b. Opinion of the Supreme Court of New Jersey as set forth in 6 N. J. 296 (1951).

c. Proceedings of March 26, 1951, when petitioner's plea of Non Vult was entered and proceedings of April 18, 1951, when sentence was imposed, all as set forth in the Brief and Appendix for the State submitted to the Superior Court of New Jersey, Appellate Division, In the Matter of the Application for the Writ of Habeas Corpus of Vincent Cicenia.

d. Proceedings of January 21, 1955, in the Essex County Court, Law Division, on application for writ of habeas corpus, all as set forth in the Appendix to petitioner's application for a writ of habeas corpus in the present cause.

e. Opinion of Appellate Division dated July 11, 1955, affirming Judge Conlon's discharge of the writ (not reported).

2. The following facts are hereby stipulated:

12 STIPULATION

a. The judgment of the Essex County Court dismissing petitioner's application for a writ of habeas corpus was affirmed by the Superior Court of New Jersey, Appellate Division, on July 11, 1955.

b. Petitioner's motion before the Supreme Court of New Jersey for leave to appeal as an indigent from the aforementioned judgment of the Superior Court of New Jersey, Appellate Division, was denied on September 12, 1955.

c. Petitioner's application to the Supreme Court of the United States for a writ of certiorari to review the aforementioned order of the Supreme Court of New Jersey was denied on December 13, 1955.

Dickinson R. Debevoise,
DICKINSON R. DEBEVOISE,
Attorney for Petitioner.

Charles V. Webb, Jr.,
CHARLES V. WEBB, Jr.,
Essex County Prosecutor and
Attorney for Respondent.

So ordered:
FORMAN,
C.J.U.S.D.C.
Dated: April 18, 1956.

In the United States District Court

Writ of habeas corpus

Filed April 24, 1956

The PRESIDENT OF THE UNITED STATES,

To R. WILLIAM LAGAY, *Superintendent of the New Jersey Prison Farm, Rahway, New Jersey, and Whoever May Have the Custody of the Body of Vincent Cicenia, Greetings:*

13 We command you that you have the body of Vincent Cicenia by you imprisoned and detained as it is said, together with the cause of such imprisonment and detention by whatever name the said Vincent Cicenia may be called and charged, before the Honorable Phillip Forman, Chief Judge of the United States District Court in and for the District of New Jersey, at the courtroom of said court in the Federal Building in the City of Trenton at ten o'clock in the forenoon on the 24th day of April, 1956, then and there to do, submit to a receive whatsoever the said judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Phillip Forman, Chief Judge of the United States District Court as aforesaid at the Federal Building in the City of Trenton on the 2d day of April, 1956.

WILLIAM H. TALLYN,
Clerk.

By SAMUEL R. BRETTELL,
Deputy Clerk.

Allowed:
FORMAN,
C.J.U.S.D.C.

In the United States District Court

Return to writ

Filed April 24, 1956

I, R. William Lagay, Superintendent of the New Jersey State Prison Farm, at Rahway, New Jersey, to whom an Order for writ of habeas corpus in the above-entitled cause is directed, do hereby certify and return that the above-named
14 petitioner, Vincent Cicenia, has been in the continued custody of the Principal Keeper of the New Jersey State Prison at Trenton and the Superintendent of the New Jersey State Prison Farm, at Rahway, New Jersey, since April 18, 1951 when the appropriate criminal court of Essex County, New Jersey imposed upon said Vincent Cicenia a sentence of life imprisonment pursuant to a criminal conviction and plea of Non Vult entered by said Vincent Cicenia to an indictment for the crime of murder returned by the Essex County Grand Jury, 1949 Term; and I do further certify that said petitioner is presently in the custody of the Superintendent of the New Jersey State Prison Farm, at Rahway, New Jersey, pursuant to the aforementioned conviction and sentence.

Dated: April 3, 1956.

R. William Lagay,
R. William Lagay,
Superintendent of the New Jersey
State Prison Farm at Rahway, New Jersey.

In the United States District Court

Opinion

Filed June 18, 1956

Appearances: Dickinson R. Debevoise, Esq., Attorney of Petitioner; Charles V. Webb, Jr., Esq., Essex County Prosecutor, by C. William Caruso, Esq., Special Legal Assistant Prosecutor, Attorney of Respondent.

FORMAN, C. J.:

This is a petition for a writ of habeas corpus by a
15 prisoner presently serving a life sentence for murder which was imposed after his plea of non vult by the late Judge Conlon of the Essex County Court. The writ issued and a hearing was held. The facts upon which petitioner seeks relief are substantially undisputed.

On March 17, 1947, Charles Kittush, the owner of a dry-goods store on Summer Avenue in Newark, New Jersey, was shot and killed during the course of a robbery. The crime went unsolved until December 17, 1949, when the Newark police obtained information implicating the petitioner, and two others—Armando Corvino and John DeMasi. The information implicating these three was obtained during an investigation of an altercation between Corvino and his wife, in which the wife supplied the leads that resulted in the solution of the murder.

December 17, 1949 was at Saturday. On that day the Orange, New Jersey police, acting presumably at the request of the Newark police, sought to locate petitioner, then about 20 years of age, at his home in Orange. They were told that he was out hunting with his brother. Word was left with petitioner's parents that he was to report to the Orange police headquarters at 9 A. M. the next day, Sunday, December 18, 1949. Petitioner complied with this request, but before he did so he sought the advice of Frank A. Palmieri, Esq., an attorney and counselor at law of New Jersey, and it was pursuant to Mr. Palmieri's suggestion that petitioner reported to the Orange police. Petitioner's brother and father accompanied him. Petitioner was separated from them; and within half an hour of his arrival at police headquarters in Orange he
was taken by Newark detectives to Newark police head-
16 quarters. Up to this time neither petitioner nor any members of his family had been informed of the reasons for his detention. Such information was refused petitioner's father and brother by the Orange police, but one of them volunteered the advice that they ought to "get a good lawyer."

At approximately 2 P. M., petitioner's father and brother

and Mr. Palmieri arrived at the Newark police station where petitioner was detained. Mr. Palmieri asked to see his client, but his request was not granted. He repeated this request periodically all afternoon and well into the evening and it was not until 9: 30 P. M., after petitioner had signed a lengthy and detailed confession, that he and his counsel were permitted to confer. Mr. Palmieri was not produced as a witness on the trial of this case, but his affidavit was admitted by stipulation. The contents of his affidavit and the testimony of petitioner's father and brother are at variance with the testimony of the Newark police as to the manner in which petitioner and his counsel were restrained from communicating with each other. According to petitioner's witnesses Palmieri's pleas were met with blunt refusals and remarks such as, "We're working on him." The police claim to have been much more decorous. But whether it was done flippantly or courteously, the fact remains that for over seven hours the Newark police formed an insuperable barrier between an accused who wanted to see his counsel, and counsel who wanted to see his client. And it was during these seven hours
17 that the police and an assistant prosecutor were able to obtain a detailed confession from petitioner.[1]

Following petitioner's arraignment the next day and subsequent indictment for murder, Mr. Palmieri began some lengthy litigation in the New Jersey courts aimed primarily at suppressing use of petitioner's confession and secondarily at securing an inspection of it before trial. These proceedings involved appeals to the New Jersey Superior Court, Appellate Division, State v. Cicenia, 9 N. J. Super. 135 (1950) and to the New Jersey Supreme Court, State v. Cicenia, 6 N. J. 296 (1951). The upshot was a holding by the Supreme Court of New Jersey that New Jersey, unlike the federal practice, had no procedure available through

[1] Petitioner also attempted to prove that the confession was wrung from him by physical abuse at the hands of the police. His proof consisted solely of his own testimony, against which must be placed the unequivocal assertions of three Newark detectives and an assistant prosecutor that there was absolutely no violence or coercion of any kind. It must be concluded that petitioner failed to carry his burden of proving that the confession was involuntary.

which inadmissible evidence could be suppressed before trial. A ruling on the admissibility of the confession secured under the circumstances set forth above could be obtained in New Jersey only at a trial on the merits when introduction of the confession was attempted. The Supreme Court did rule, however, that a trial court had discretionary power to permit inspection of a confession by an accused and his counsel.[2]

Subsequently petitioner was given an opportunity to plead non vult to a charge of first degree murder pursuant
18 to the provisions of N. J. Rev. Stat. 2:138–3 (now N. J. Rev. Stat. 2A:113–3). Under this statute acceptance of such a plea is discretionary with the trial court, State v. Martin, 92 N. J. L. 436 (E. & A. 1919), and the maximum sentence that may be imposed after such a plea is life imprisonment. Petitioner offered a plea of non vult. The Essex County Court accepted it upon recommendation of both petitioner's counsel and the assistant prosecutor in charge of the case, and on April 18, 1951 petitioner and his two co-defendants were sentenced to life imprisonment.

Petitioner began this collateral attack on his conviction with a petition for a writ of habeas corpus addressed to the Essex County Court. This was heard and denied on January 21, 1955 by the late Judge Conlon. The Superior Court of New Jersey, Appellate Division affirmed that judgment in a one-page unreported opinion. The Supreme Court of New Jersey denied leave to appeal in forma pauperis. A petition for a writ of certiorari to the United States Supreme Court was denied, Cicenia v. New Jersey, 350 U. S. 925. Petitioner thus exhausted his state remedies as required by 28 U. S. C. § 2254 and Darr v. Burford, 339 U. S. 200 (1950); and thereafter filed this application for a writ of habeas corpus.

The theory relied on is that since the plea of non vult to the indictment for murder was motivated by the presence

[2] This discretion can only be exercised upon a showing of good cause by the accused. State v. Tune, 13 N. J. 203 (1953); Application of Tune, 230 F. 2d 883 (3rd Cir. 1956), cert. denied, 351 U. S.

of the confession, and since the confession was taken in derogation of petitioner's right under the Fourteenth
19 Amendment to communicate with his counsel, petitioner is being unconstitutionally restrained of his liberty.[3]

It must first be decided whether the merits of petitioner's claim can now be met. The Essex County Court held that the claim of denial of counsel and illegality in procuring the confession need not be reached because any rights petitioner had under these contentions were waived by the plea of non vult. It has been held in New Jersey that a judgment of conviction following a plea of guilty it not subject to attack on the ground that there lurks in the background an illegally procured confession. In re Domako, 20 N. J. Super. 314 (App. Div. 1952). However, in affirming the judgment of the Essex County Court the Appellate Division, in its unreported opinion, held flatly that "(T)he denial of permission to confer with counsel prior to arraignment has been held to deprive the accused of no constitutional right" and cited as authority State v. Grillo, 11 N. J. 173 (1952). See also State v. Murphy, 87 N. J. L. 515 (E. & A. 1915) which holds that an accused under the New Jersey Constitution has a right to counsel for his defense only and that this contemplates judicial proceedings and the right to access to counsel to prepare for them. The right does not exist at any earlier time. This is apparently the law of New Jersey today. State v. Grillo, supra. At any event, it appears that the
20 Appellate Division decided petitioner's claim of denial of right to counsel on the merits thus holding, inferentially at least, that there is no taint of illegality touching the confession. Since the state courts reached the merits, the merits are reachable here. Brown v. Allen, 344 U. S. 443, 486 (1953):

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[3] Petitioner had the benefit of appointed counsel at his habeas corpus hearing before the Essex County Court. The subsequent appeals to the New Jersey appellate courts and the petition for certiorari to the United States Supreme Court were taken pro se. The petition for the writ was lodged here by petitioner pro se. His present counsel was appointed for him by this court and presented petitioner's case in a most able manner by filing an excellent brief as well as hotly contesting the merits of petitioner's case at the hearing.

"* * * this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal federal habeas corpus is available following our refusal to review such state habeas corpus proceedings. * * *"

There is another reason why the substance of petitioner's allegations must be considered. The Supreme Court has recently said that "a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause. * * *" Herman v. Claudy, 350 U. S. 116, 118 (1956). Compare Townsend v. Burke, 334 U. S. 736, 738 (1948). There can be little doubt that petitioner's plea of non vult was based on the confession, for at the time of sentencing the assistant prosecutor urged as a reason for acceptance of the plea the lack of evidence other than the confessions of the three accused. Petitioner was unable to obtain a ruling on the legality of his confession unless he was willing to go to trial on the merits and risk a possible death sentence. This puts a harsh burden of choice on a defendant in such a situation, a burden that is not present in other than capital causes since it is only in the latter that New Jersey permits the imposition of a harsher penalty after jury verdict of guilty than it does upon plea of non vult. It is much easier to find a waiver of rights under a claim of illegal procurement of a confession in a non-capital case where the law punishes with equal severity every convicted person whether that conviction is by verdict after trial or follows the accused's admission in open court. [See United States ex rel. Trowbridge v. Com. of Pa., 112 F. Supp. 356 (W. D. Pa. 1952) affirmed o. b. 204 F. 2d 689 (3rd Cir. 1953)]. than it is to find such waiver in capital cases where under law like that of New Jersey the difference between pleading non vult and fighting out the merits is the difference between insuring life and risking death. To put it another way, when an accused voluntarily pleads guilty or non vult after rendering a confession to the police there is very little ground left upon which to postulate a factual finding that the plea was "based" on the confession if the law affords no extraordinary encourage-

21

ment to make the plea rather than to stand trial on the merits. But in capital cases in New Jersey there is an extraordinary encouragement to the accused to offer a plea of non vult if the court will accept it, and that encouragement is, of course, the death sentence that will result if on the trial the jury fails to recommend the lesser punishment of life imprisonment. This circumstance leaves open the door to finding that the plea is "based" on the confession and where that is the case the validity of the conviction and the underlying confession may be adjudicated on habeas corpus. Herman v. Claudy, supra. Although in that case the language was directed specifically to confessions "extorted by violence or mental coercion", it is obvious that the principle applies equally to confessions constitutionally assailable on other grounds.

22 When the lowest court in the federal judicial system reconsiders legal claims that have been presented to the highest court of a state and there turned down it is performing its most delicate judicial task. Federal judges do not welcome this kind of business. Despite these considerations one cannot help stating that a personal reaction to the manner in which the police chose to extract petitioner's confession from him is a highly adverse one. Not only was petitioner deprived of a cherished American right—the right to see a lawyer—but the dignity of the legal profession itself was demeaned when the police and an assistant prosecutor arbitrarily refused to permit this petitioner's counsel to perform the traditional role of the lawyer in informing an accused of his rights. But these personal notions are not the law.

The only frank discussion of the right of local police to question suspects prior to arraignment and without counsel in the recent pages of the United States Reports is in the concurring opinion of Mr. Justice Jackson in Watts v. Indiana 338, U. S. 49, 57 (1949). He there points out the dilemma this problem poses for a free society, and somewhat unenthusiastically states his view in favor of such police questioning in the following language:

"I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary meas-

ures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as con-
23 front us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.

"I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society." 338 U. S. at pp. 61–62.

The Court has never held that lack of counsel at the time of police interrogation of itself invalidates a confession. It has, however, mentioned this in connection with other circumstances adding up to a factual complex rendering a confession invalid. See Watts v. Indiana, supra; Turner v. Pennsylvania, 338 U. S. 62 (1949); Harris v. South Carolina, 338 U. S. 68 (1949); Haley v. Ohio, 332 U. S. 596 (1948). But it cannot be doubted that confessions obtained by police interrogation prior to arraignment and the access to counsel that is provided at that time are on the borderline of due process. There are those who would outlaw such questioning altogether. Gallegos v. Nebraska, 342 U. S. 55, 73 (1951) (dissenting opinion); Stroble v. California, 343 U. S. 181, 203 (1952) (dissenting opinion).

In the Stroble case, supra, an attempt was made to put the identical issue raised here before the Supreme Court.

"The questioning of petitioner in the District Attorney's office lasted approximately two hours. About 45 minutes after petitioner had begun his confession, an attorney, Mr. Gray, called at the waiting room of the District Attorney's office and asked for the assistants handling the case. Upon being advised that they were busy he then asked for the District Attorney. Upon being told that the District Attorney was also in conference and could not be disturbed, Mr. Gray asked to see petitioner. It is uncontradicted that at that point Mr. Gray stated to a police department inspector who was present in the waiting room that he 'just wanted to hear from [petitioner's] lips whether or not' petitioner had committed the murder, 'so that [he] could report back' to petitioner's son-in-law. Mr. Gray was denied admission to the room in which petitioner was being questioned, but talked to an assistant district attorney after the confession had been completed. Mr. Gray was permitted to see petitioner that evening. Mr. Gray did not represent petitioner during the trial, but on the motion for new trial was substituted, at petitioner's request, for the Public Defender." Stroble v. California, 343 U. S. at 187–188.

In ruling upon the contention that it was a denial of due process to refuse access to the accused by the lawyer sent by the accused's son-in-law the Court said:

"As to the refusal of the prosecutors to admit counsel during their interrogation of petitioner, counsel stated that he had come to the District Attorney's office at the request of petitioner's son-in-law merely to inquire of petitioner as to his guilt. At no point did petitioner himself ask for counsel. In light of these facts, the District Attorney's refusal to interrupt the examination of petitioner, which had been proceeding for almost an hour, so that counsel could make inquiry for petitioner's son-in-law, does not constitute a deprivation of due process, either independently or in conjunction with all other circumstances in this case. *While district attorneys should always honor a request of counsel for an interview with a client*, upon the record before us there is no showing of prejudice." 343 U. S. at 197–198. [Emphasis added.]

The italicized portion of the excerpt quoted above is advanced as being indicative of the attitude of the Supreme Court on this problem. But it is difficult to believe, in view of the well-known reluctance of that Court to decide
25 constitutional issues where there is no necessity for it, that the Court meant to rule upon a point of constitutional law and in the same sentence find adequate ground for avoiding the ruling. The language relied on by petitioner must be taken as a statement of preference for what is undoubtedly the more civilized practice and not as a statement of constitutional law.

This result is reached without enthusiasm. Perhaps it may be partially justified by practical considerations:

"It does not militate against respect for the deeply rooted systems of criminal justice in the State that such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." Foster v. Illinois, 332 U. S. 134, 139 (1947).

The writ will be discharged and the petitioner remanded to custody upon the submission of an appropriate order to that effect by the respondent consented to as to form only by counsel for the petitioner.

In the United States District Court

Order denying writ of habeas corpus

July 17, 1956

Upon reading the petition for the issuance of a writ of habeas corpus for the release of Vincent Cicenia, and the matter having come on to be heard before this Court on the 24th day of April, 1956, and having heard the evidence given in this cause, and after hearing the argument of Dickinson R. Debevoise, attorney for the petitioner, and the argument of
26 C. William Caruso, Special Legal Assistant Prosecutor of Essex County for the respondent, and having duly considered the same.

It is on this 17th day of July, 1956, ordered that the petition for a writ of habeas corpus be dismissed and that the writ of habeas corpus be quashed.

FORMAN,
U. S. D. C. J.

Approved as to form only:
Dickinson R. Debevoise,
DICKINSON R. DEBEVOISE,
Attorney for Petitioner.

In the United States District Court

Certificate of probable cause

Filed July 17, 1956

Vincent Cicenia, the above named petitioner, having applied to the Court for a Writ of Habeas Corpus, and the same having been denied by Order dated July 1956, and application having been made by Dickinson R. Debevoise, attorney for petitioner for a Certificate of Probable Cause,

It is on this 17th day of July, 1956, ordered that although the petition for a Writ of Habeas Corpus was denied that a Certificate of Probable Cause is hereby issued in compliance with the provisions of United States Code, Title 28, Section 2253.

FORMAN,
C. J. U. S. D. C.

27 In the United States District Court

Notice of appeal

Filed July 20, 1956

Name and address of Appellant: Vincent Cicenia, 29342, New Jersey State Prison Farm, Rahway, New Jersey.

Name and address of Appellant's Attorney: Dickinson R. Debevoise, 744 Broad Street, Newark 2, New Jersey.

The judgment appealed from: An order of the Hon. Phillip

Forman entered July 17, 1956, denying appellant a Writ of Habeas Corpus.

The above named appellant hereby appeals to the United States Court of Appeals for the Third Circuit from the above stated judgment.

Dated: July 19, 1956.

Dickinson R. Debevoise,
DICKINSON R. DEBEVOISE,
Attorney for Appellant.

28 [Clerk's certificate to foregoing transcript omitted in printing.]

29 *Petitioner's Exhibit No. 1*

Supreme Court of New Jersey

Case No. 629

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT

v.

VINCENT CICENIA, ET ALS., DEFENDANT-APPELLANT

CRIMINAL ACTION. INDICTMENT NO. 909. TERM 1949. ON INDICTMENT FOR MURDER. ON APPEAL FROM JUDGMENT OF SUPERIOR COURT (APPELLATE DIVISION), DISMISSING APPEAL OF DEFENDANT FROM ORDER OF ESSEX COUNTY COURT, LAW DIVISION (CRIMINAL)

APPENDIX TO APPELLANT'S BRIEF

FRANK A. PALMIERI,
Attorney for and of Counsel with
Appellant, Vincent Cicenia,
347 Main Street, Orange, New Jersey.

30 *Indictment*

ESSEX COUNTY, TO WIT:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Armando Corvino, Vin-

cent Cicenia and John De Masi, on the 17th day of March, 1947, at the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did wilfully, feloniously and of their malice, aforethought kill and murder Charles Kittuah, against the peace of this State, the government and dignity of the same.

COUNTY PROSECUTOR,
J. A. COUCH, Jr.,
Foreman.

A True Bill.

31 NOTICE OF MOTION

To DUANE E. MINARD, Esq.,
Prosecutor of the Pleas of Essex County:

DEAR SIR: Please take notice that I shall on Friday, March 3rd, 1950, or as soon thereafter as counsel may be heard apply before one of the Judges of the Superior Court of New Jersey who may then be sitting, at the Essex County Court House, Newark, New Jersey,

1. For an order directing you, as Prosecutor of the Pleas of Essex County, to produce before this Court for inspection by this defendant and his counsel, prior to trial of the cause, the following papers, to wit:

(a) Alleged Written Confession of Armando Corvino, defendant;

(b) Alleged Written Confession of Vincent Cicenia, defendant; and

(c) Alleged Written Confession of John De Masi, defendant.

2. To suppress the written confession of Vincent Cicenia, defendant, for the reasons that

(a) A Written Confession was obtained from defendant while he was under illegal arrest and custody, there being no complaint, no summons and no warrant in existence or served upon the defendant at the time of his arrest, and at the time the written statement of confession was obtained from him,

(b) Prior to making same the defendant was not ad-
32 vised and informed of his constitutional and legal rights, to wit: that he was not required to make a statement and that any statement made by him might be used against him,

(c) Prior to making same, the defendant was not advised and informed of his constitutional and legal rights, to wit: allowed reasonable time and opportunity to consult counsel, and

(d) Prior to making said written statement of confession the defendant was denied the right of counsel and the right of the assistance of counsel by the Prosecutor of the Pleas of Essex County (Assistant Prosecutor Maurice McKeown) and members of the Police Department of the City of Newark.

All of the foregoing being contrary to law, the Rules Governing the Courts of the State of New Jersey, the Constitution of the State of New Jersey and the Constitution of the United States of America.

3. For leave to take oral testimony and depositions in further support of paragraph 2 of this motion pursuant to the order of this court.

FRANK A. PALMIERI,
Attorney for Defendant, Vincent Cicenia.

33 AFFIDAVIT OF FRANK A. PALMIERI

STATE OF NEW JERSEY,
County of Essex, ss:

Frank A. Palmieri, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am an attorney at law of the State of New Jersey.

2. On Sunday, December 18th, 1949, I was engaged by the defendant, Vincent Cicenia, Mr. and Mrs. Angelo Cicenia, his mother and father and Thomas Cicenia, his brother, to represent him in matter for which he was apprehended.

3. In that capacity and as such I arrived at Newark Police Headquarters on Sunday, December 18th, 1949, at 2 P. M. I reported to Lieutenant in charge of headquarters, one Lieutenant Herman Cohen. This was in Room 302 of Headquarters. Sergeant Shoen was present. I informed him that I was an attorney at law of New Jersey, that I was engaged by the defendant, his parents and brother and to represent Vincent Cicenia who was being held by him on a charge of murder. Lieutenant Cohen said "you can't see him." I waited until 2:30 P. M. I asked the same officer if I could see my client.

Again Lieutenant Cohen responded, "you can't see him." At 3 P. M. I again entered Room 302 from the hallway where I had been kept waiting and had this conversation with Lieutenant Cohen.

PALMIERI. "I'd like to see my client."

Lt. COHEN. "You can't see him" [with a smile]

34 PALMIERI. "You know we have a Constitution in the United States and in New Jersey and we also have court rules which guarantee to a person the right of counsel?"

Lt. COHEN. "Yes, I do."

PALMIERI. "Then why don't you let me see Cicenia?"

Lt. COHEN. "I can't let you see him. They're still working on him."

PALMIERI. "Who are they?"

Lt. COHEN. "Assistant Prosecutor McKeown is up there."

PALMIERI. "But he's in the City of Newark Police Headquarters. He's in your custody, is he not?"

Lt. COHEN. "He is."

PALMIERI. "Then why do you let the Prosecutor run your Headquarters? Can I see your slate? Has Cicenia been slated?"

Lt. COHEN. "Yes, he has."

PALMIERI. "Let me see the slate."

Lt. COHEN. "No."

PALMIERI. "A slate is a public record, is it not?"

Lt. COHEN. "Yes, but you can't see it."

PALMIERI. "You hold Cicenia, do you have a warrant?"

Lt. COHEN. "Yes, McKeown has it in his possession."

PALMIERI. "Well, if McKeown has it you have no right to hold Cicenia in your jail. You have no legal authority for his incarceration."

Lt. Cohen thereupon telephoned Assistant Prosecutor Maurice McKeown who had custody of my client in the "interrogation room" on the fourth floor, above. Lieutenant Herman Cohen informed Assistant Prosecutor McKeown, in my

35 presence, that I was there, that I represented Vincent Cicenia and that I was demanding to see him. While Lieutenant Cohen was talking to McKeown I asked Lieutenant Cohen to let me speak to him. He refused. I didn't

hear what McKeown said but Lieut. Cohen hung up the receiver and said to me, "I refuse to answer any further questions concerning a warrant." I then asked Lieutenant Cohen if I could call McKeown on the telephone. Lieutenant Cohen responded, "McKeown is aware of your presence. Now look, we're through. If you're trying to ball me up, I'm not going to answer any more of your questions."

At 4 P. M., Detective Norris, connected with the Newark Police Department, was called down by Lieut. Cohen. I shook hands with him and I let him know my mission. He said, "I know about it. I can't let you see him. We're working on him. The investigation is not complete." I asked Detective Norris, "when can I see him?" He said, "I can't tell you." I then said "can I see him in a minute, two minutes, five minutes, when?" He answered, "I can't tell you." I then asked him to step into Lieutenant Cohen's office. He did. I told Lieut. Cohen I was Cicenia's attorney and that I would like to see him. The Lieutenant asked Detective Norris, who said "no". Lieutenant then said "you're the boss." I then said to both of them, "you know the law and the rules. He's entitled to see counsel and still you refuse to let me see him. Do you have a warrant?" Detective Norris said "yes."

I thereupon called the office of the Newark Evening News at Market 2–4505. There was no answer. I thereupon (4:30 P. M.) called the office of the Newark Star-Ledger and talked to a Mr. Dixon, at the City Desk. I told him the story
36 aforestated and that my client was being deprived of his right of counsel. He said he'd call his Cliff Bennett, one of his reporters who was supposed to be in the building, and asked me to contact him in the building. I saw Cliff Bennett a few minutes later. He told me he had received a call from Dixon. He, in my presence and that of a girl reporter for a New York newspaper, asked Lt. Herman Cohen if I had demanded to see my client. Lt. Cohen said "yes". He then asked him, "did you let counsel see his client?" Lt. Cohen answered "no". Mr. Bennett was later joined by a reporter of the Newark Evening News whom I know by sight but not by name. He went through the same process as Bennett with the same results.

As the result of the pressure I was employing, Assistant Prosecutor McKeown descended from the fourth floor at 4:46 P. M. This conversation took place after McKeown greeted me and acknowledged my relationship with defendant.

PALMIERI. "I want to see Cicenia."

McKEOWN. "We're not through."

PALMIERI. "I want to see him now, not in a minute or two. You know the law and the rules. Am I not entitled to see him now?"

McKEOWN. "Sure. Don't put me on the spot. You'll see him."

PALMIERI. "When?"

McKEOWN. "When investigation is completed."

Mr. PALMIERI. "When is that?"

McKEOWN. "In a few minutes."

PALMIERI. "I want to see him now. I'm demanding to see him now, not in a few minutes."

McKEOWN. Walking away and up the stairs—"I'll see you in a few minutes."

37 NOTE: Both Clifford Bennett and girl reporter previously mentioned were present during foregoing conversation. Thereafter, on every half hour and hour I demanded of the desk lieutenant permission to see my client and it was refused.

At 6:51 P. M. I entered the same room 302 and a shift of officers had taken place. I thought the man in charge was a Captain but I later found out he was Lieutenant Flynn.

This conversation took place.

PALMIERI. "Captain, may I see my client, Vincent Cicenia? I'm an attorney."

Lt. FLYNN. "Did you ask to see him before."

PALMIERI. "Yes."

Lt. FLYNN. "What did they tell you."

PALMIERI "They refused to let me see him. I'm asking you, now."

Lt. FLYNN. "You can't see him."

PALMIERI. "Thank you."

Thereafter, on every half hour of the clock I repeated my demand to see my client. Lt. Flynn denied my request.

At 9:30 P. M. Assistant Prosecutor McKeown came down and called me aside. He said "I'm going to let you see your client now." He escorted me to a room on the fourth floor where with a guard in hearing attendance I was permitted to see and speak with the defendant, Vincent Cicenia, for the first time.

I wish to stress that Vincent Cicenia, the defendant, had signed an alleged confession a few minutes before I was permitted to see him.

From 2 P. M. to and through 9:30 P. M. Assistant Prosecutor McKeown, representing the Prosecutor of the Pleas of
38 the County of Essex, and Lts. Cohen and Flynn and Detective Norris and other members of the Newark Police Department, all of whom had possession and custody of the defendant, had full knowledge that defendant, Vincent Cicenia, was represented by me and that I was downstairs on the third floor, demanding that defendant be afforded the right to see me, his counsel, all of which was denied and refused to defendant throughout this period of time.

4. I cannot obtain ex parte affidavits from Lieut. Herman Cohen, Lieut. Flynn, Sgt. Shoen and Detectives Norris and Kenny of the Newark Police Department, Assistant Prosecutor Maurice McKeown and Detective George Maher of the office of the Prosecutor of the Pleas of Essex County, Clifford Bennett, newspaper reporter of the Newark Star-Ledger, the girl reporter for a New York newspaper and the reporter of the Newark Evening News, all mentioned in this affidavit as having knowledge concerning the denial of counsel to the defendant and all of whom, for obvious reasons, have not and will not execute ex parte affidavits. This testimony is essential to the support of this application.

FRANK A. PALMIERI.

Sworn and subscribed to before me on this 27th day of February, 1950.

[SEAL] MILDRED E. MARIANI,
A Notary Public of New Jersey.

My commission expires 12/5/51.

AFFIDAVIT OF THOMAS CICENIA

STATE OF NEW JERSEY,
County of Essex, ss:

Thomas Cicenia, of full age, being duly sworn according to law upon his oath deposes and says:

1. I reside at No. 138 Summer Street, Orange, New Jersey.

2. I am a brother of Vincent Cicenia, defendant.

3. On Sunday, December 18th, 1949, at 1 P. M., my mother and father, Mr. and Mrs. Angelo Cicenia, and I engaged Frank A. Palmieri, an attorney at law of New Jersey, to act as counsel for Vincent Cicenia, my brother, who was held by the Orange Police on a criminal charge when he reported there voluntarily at their request at 9 A. M. that day, with instructions to fully represent my brother as his counsel in any and all criminal charges for which he was held and with which he might be charged.

4. Before my brother reported to the Orange Police Headquarters as stated, and in Vincent's presence and mine, my father, Angelo Cicenia, called said Frank A. Palmieri on the telephone and spoke with him concerning the request the said Orange Police made on the night before that Vincent call at the Orange Police Headquarters.

5. When my father finished his conversation with Mr. Palmieri on the telephone he said to Vincent "Frank said to report to the Orange Police Headquarters and that if we need him to call him back, on the telephone or go to pick him up."

6. We found out unofficially shortly after noon that
40 day that Vincent was being questioned about a murder. My father and mother and I went to Mr. Palmieri's home and engaged him, as aforestated, to represent Vincent.

7. I drove Mr. Palmieri to Newark Police Headquarters. We arrived there at 2 P. M. We went up to Room 302 on the third floor. Lieutenant Herman Cohen was behind the desk. Another police officer was present. I was told his name was Sergeant Shoen. The following conversation took place in that room at 2 P. M. in my presence, to wit:

Mr. PALMIERI. "I represent Vincent Cicenia. I am an attorney. I've been engaged by the parents and brother of

Vincent Cicenia to represent him. I understand he's being held on a charge of murder."

Lt. COHEN. "You can't see him."

At 2: 30 P. M. the following conversation took place, to wit:

Mr. PALMIERI. "Can I see my client?"

Lt. COHEN. "You can't see him."

At 3 P. M. the following conversation took place, to wit:

PALMIERI. "I'd like to see my client."

Lt. COHEN. "You can't see him."

PALMIERI. "You know we have a Constitution in the United States and in New Jersey and we also have court rules which guarantee to a person the right of counsel?"

Lt. COHEN. "Yes, I do."

PALMIERI. "Then why don't you let me see Cicenia?"

Lt. COHEN. "I can't let you see him. They're still working on him."

PALMIERI. "Who are they?"

Lt. COHEN. "Assistant Prosecutor McKeown is up there."

41 PALMIERI. "But he's in the City of Newark Police Headquarters. He's in your custody, is he not?"

Lt. COHEN. "He is."

PALMIERI. "Then why do you let the Prosecutor run your Headquarters? Can I see your slate? Has Cicenia been slated."

Lt. COHEN. "Yes, he has."

PALMIERI. "Let me see the slate?"

Lt. COHEN. "No."

PALMIERI. "A slate is a public record, is it not?"

Lt. COHEN. "Yes, but you can't see it."

PALMIERI. "You hold Cicenia, do you have a warrant?"

Lt. COHEN. "Yes, McKeown has it in his possession."

PALMIERI. "Well, if McKeown has it you have no right to hold Cicenia in your jail. You have no legal authority for his incarceration."

Then Lieutenant Cohen picked up the phone and called Assistant Prosecutor McKeown on the fourth floor. Lieut. Cohen spoke in the telephone and said "attorney Frank Palmieri is here and says that he represents Vincent Cicenia and insists on

seeing him." Mr. Palmieri was present at the time and said to Lieutenant Cohen, "Let me speak to him."

Lt. Cohen said "no." I didn't hear what McKeown said to Lt. Cohen but as soon as Lt. Cohen hung up the receiver he refused to answer any further questions concerning a warrant.

Mr. Palmieri then asked Lt. Cohen, "can I call McKeown on the telephone?" Lt Cohen answered, "McKeown is aware of your presence. Now look, we're through. If your're trying to ball me up, I'm not going to answer any more of your questions."

42 At 4 P. M. Detective Norris, connected with the Newark Police Department, was called down by Lt. Cohen. Detective Norris shook hands with Mr. Palmieri and Mr. Palmieri told him that he represented my brother and that he was anxious to see his client.

Detective Norris answered, "I know about it. I can't let you see him. We're working on him. The investigation is not complete."

Then Mr. Palmieri asked Detective Norris, "When can I see him?"

Detective Norris answered, "I can't tell you."

Mr. Palmieri then asked Detective Norris, "Can I see him in a minute, two minutes, five minutes, when?"

Detective Norris answered again, "I can't tell you."

Mr. Palmieri then asked Detective Norris to step into Lieutenant Cohen's office. He did and Mr. Palmieri and I followed. Mr. Palmieri said to Lieut. Cohen, "I am Cicenia's attorney and I would like to see him." The Lieutenant asked Detective Norris if Mr. Palmieri could see my brother. Detective Norris said "no." The Lieutenant then said "you're the boss."

Mr. Palmieri then said to both of them, "you fellows know the rules. Cicenia is entitled to see counsel and still you refuse to let me see him. Do you have a warrant?"

Detective Norris answered, "Yes."

Mr. Palmieri thereupon entered a telephone booth and told me that he would try to get the office of the Newark Evening News. When he came out of the booth he said there was no answer. Shortly thereafter he called the office of the Newark

Star-Ledger. I heard him talking to a Mr. Dixon. I
43 heard Mr. Palmieri tell Mr. Dixon substantially all that had happened up to that point. I heard Mr. Palmieri say "yes, Cliff Bennett, I know him. I'll look around for him." A few minutes later I saw Mr. Palmieri talking to Cliff Bennett, the Newark-Star-Ledger reporter, and a girl reporter for a New York newspaper. We all entered Room 302 and in the presence of all of us Mr. Bennett asked Lt. Cohen if Mr. Palmieri had demanded to see his client.

Lt. Cohen said "yes."

Mr. Bennett then asked him, "Did you let counsel see his client?"

Lt. Cohen answered, "No."

Mr. Bennett was later joined by a reporter of the Newark Evening News whom Mr. Palmieri told me that he knew by sight but not by name. The reporter for the Newark Evening News went through the same process as Mr. Bennett with the same results.

As the result of Mr. Palmieri's pressure Assistant Prosecutor McKeown came down from the fourth floor at 4:46 P. M. The following conversation took place after McKeown greeted Mr. Palmieri and acknowledged his relationship with the defendant, to wit:

PALMIERI. "I want to see Cicenia."

MCKEOWN. "We're not through."

PALMIERI. "I want to see him now, not in a minute or two. You know the law and the rules. Am I not entitled to see him now?"

MCKEOWN. "Sure. Don't put me on the spot. You'll see him."

PALMIERI. "When?"

MCKEOWN. "When investigation is completed."

PALMIERI. "When is that?"

MCKEOWN. "In a few minutes."

PALMIERI. "I want to see him now. I'm demanding to see him now, not in a few minutes."

44 McKeown—walking away and up the stairs—"I'll see you in a few minutes."

During this conversation both Clifford Bennett and the girl reporter from the New York newspaper were present.

Thereafter, on every half hour and hour Mr. Palmieri demanded of the desk lieutenant permission to see his client and it was refused.

At 6:51 P. M. we entered the same room 302 and a shift of officers had taken place. The following conversation took place between Mr. Palmieri and the man in charge at the desk, Lieutenant Flynn.

PALMIERI. "Captain, may I see my client, Vincent Cicenia? I am an attorney."

Lt. FLYNN. "Did you ask to see him before."

PALMIERI. "Yes."

Lt. FLYNN. "What did they tell you."

PALMIERI. "They refused to let me see him. I'm asking you, now."

Lt. FLYNN. "You can't see him."

PALMIERI. "Thank you."

Thereafter, on every half hour and hour of the clock Mr. Palmieri repeated his demand to see his client. Lt Flynn denied his request.

At 9:30 P. M., Assistant Prosecutor McKeown came down and called Mr. Palmieri aside. He said "I'm going to let you see your client now." He then escorted Mr. Palmieri out of the room.

THOMAS CICENIA.

Sworn and subscribed to before me on this 27 day of February, 1950.

[SEAL] MILDRED E. MARIANI,
A Notary Public of New Jersey.

My commission expires 12/5/51.

45 AFFIDAVIT OF VINCENT CICENIA

STATE OF NEW JERSEY,
County of Essex, ss:

ss:

Vincent Cicenia being duly sworn according to law upon his oath deposes and says:

1. I am the defendant in this cause.

2. On Sunday, December 18, 1949, at 9 A. M. I voluntarily reported to the Orange Police Department and was placed in custody by Sergeant-Detective Deusinger of that department. I remained in Orange until about 9:30 A. M. until two detectives from the Newark Police Department took me into custody and took me to Newark Police Headquarters. I arrived at the latter place about 10 A. M., at which time I was placed in a cell. At about 1 P. M. I asked the guard who was in charge of the cell block for permission to contact my lawyer. He said that he was sorry but that he couldn't do it. I remained in my cell until 7 P. M. the same day, at which time they commenced to interrogate me. This was in the "interrogation room" on the fourth floor of the said Newark Police Headquarters. I was questioned by Detectives George Maher of the Essex County Prosecutor's Office and Detective Norris and Kenny of the Newark Police Department. They interrogated me orally for about one hour until about 8 P. M., at which time Detective George Maher stated that he wanted me to sign a written statement. I said to him "before I go through with this I would like to see my lawyer to get some advice."

Detective Maher answered, "He isn't here at present. As soon as we get this over with we'll try to get in touch with him for you."

46 It was about 8 P. M. when Detective Maher started to write out the statement. Detective Norris was present and so was Assistant Prosecutor McKeown. It took him a good hour to write out the statement. When Detective Norris finished writing the statement he called in a merchant from Maplewood. He was supposed to be the witness to the statement. When the merchant entered the room there also was in the room at that time Assistant Prosecutor McKeown, Detective George Maher and this merchant, when Detective George Maher asked me to sign the statement.

I said to him and to Assistant Prosecutor McKeown, "before I sign it I would like to see my lawyer."

Detective Maher answered, "well you're going to tell him the same thing you told us?"

I answered, "well, I don't know what I am getting myself into and I would like to get some advice from my lawyer before I sign."

Assistant Prosecutor McKeown then asked, "whose your lawyer?"

I answered, "Frank A Palmieri."

Assistant Prosecutor McKeown then said, "well it's Sunday and you're only going to disturb him. He's probably with his family. What difference does it make? Go ahead and sign it and then we'll call him on the 'phone."

I had asked to see my lawyer earlier in the afternoon and that right and privilege was denied to me. I asked to see my lawyer, Frank A. Palmieri, at greater length after I was interrogated orally and before the statement was written out by Detective Maher and that right and privilege was denied to me. I asked to see my lawyer, Frank A. Palmieri, after the statement was written out by Detective Maher and before I signed the statement and that right and privilege was denied to me.

47 I was out of complete contact with the outside world and did not have the benefit of independent legal advice. I knew that I was cornered. I was in a state of great confusion and was in a quandary. I felt that I would never be permitted to see the members of my family or my lawyer unless I signed the statement which was written out by the police. I felt that no alternative was left to me except to do as I was told so I reluctantly and begrudgingly signed the statement which was written by a police officer in his own words and in his own handwriting.

3. At no time on December 18, 1949, or at any other time was there either a summons, complaint or warrant served upon me or upon members of my family for me from the time of my arrest until my arraignment at 11 A. M. on December 19, 1949, before Magistrate Jacobs (Second Precinct), when a complaint was made and read to me charging me with murder.

4. At no time was I advised by the police or any other prosecuting officer of the law, prior to making said written statement, that I was not required to make a statement and that any statement made by me might be used against me nor was I ever al-

lowed reasonable time and opportunity to consult counsel. As a matter of fact when I requested to see counsel that right was denied to me and when my counsel, Frank A. Palmieri, frantically sought to consult with me he was denied that right by both the police and the Prosecutor of the Pleas of Essex County.

VINCENT CICENIA.

Sworn and subscribed to before me on this 27 day of February, 1950.

[SEAL] JAMES P. FUREY,
Notary Public, State of New Jersey.

My Com. exp. 4/12/50.

48 MEMORANDUM BY THE COURT

Appearances: Frank Palmieri, Esq., for the Defendant, Vincent Cicenia; Duane E. Minard, Esq., Essex County Prosecutor (Maurice McKeown) for the State.

CONLON, J.:

The defendant, Vincent Cicenia moves in advance of trial on Notice and affidavits "to suppress the written confession of Vincent Cicenia, defendant" on the general grounds that the same was obtained from him in violation of his legal and constitutional rights. Defendant's counsel was asked to file a memorandum setting forth his authorities for the contention that this Court has jurisdiction to consider such a motion.

He frankly admits that neither by Statute nor Rule or judicial determination is there authority for his motion. He bases his argument mainly upon the theory that this Court should adopt the proceeding of the Federal Court provided for by Rule 41 (e) of the Federal Rules of Criminal Procedure. The answer to that contention is that this Court does not have the legal right to enact procedural or evidential changes by judicial pronouncement.

The right of the defendant may be fully protected at the trial when, in accordance with our well established rules of procedure, the Court will pass upon the admissibility of the alleged confession so far as its competency is concerned, and,

if it should be admitted into evidence, the jury will have an opportunity to pass upon its weight.

The Motion is denied.

Dated March 23rd, 1950.

JOSEPH E. CONLON,
Judge Essex County Court.

49 ORDER

This matter being opened to the court by Frank A. Palmieri, Esq., Attorney for the defendant, Vincent Cicenia, and in the presence of Maurice McKeown, Assistant Prosecutor of Essex County, who appeared for and on behalf of Duane E. Minard, as Prosecutor of the Pleas of Essex County, for the plaintiff, on motion of the defendant, Vincent Cicenia, before trial,

(1) for an order directing the Prosecutor of the Pleas of Essex County, to produce before this Court for inspection by this defendant and his counsel, prior to trial of the cause, the following papers, to wit:

(a) Alleged Written Confession of Armando Corvino, defendant;

(b) Alleged Written Confession of Vincent Cicenia, defendant; and

(c) Alleged Written Confession of John De Masi, defendant.

(2) to suppress the alleged written confession of Vincent Cicenia, the defendant, upon the grounds set forth in Notice of Motion duly filed herein.

It is on this 6th day of April, 1950, ORDERED that said Motion for an Order to produce and for suppression of the alleged written confession of the defendant, as aforesaid, be and is hereby denied.

JOSEPH E. CONLON,
Judge of the Essex County Court.

50 NOTICE OF APPEAL

Notice is hereby given that Vincent Cicenia, defendant, appeals to the Appellate Division of the Superior Court of New Jersey, from an Order of the Essex County Court, Law Divi-

sion, Criminal, Essex County, entered in favor of the plaintiff in this cause of action on April 6, 1950.

FRANK A. PALMIERI,
Attorney for Defendant, Vincent Cicenia.

Dated May 3, 1950.

51 OPINION OF APPELLATE DIVISION

Argued August 7, 1950; decided August 17, 1950

Before Judges JACOBS, BIGELOW and JAYNE.

Mr. Frank A. Palmieri argued the cause for the appellant.

Mr. C. William Caruso argued the cause for the respondent (Mr. Duane E. Minard, Jr., Essex County Prosecutor, Attorney).

The opinion of the Court was delivered by Jacobs, S. J. A. D.

The defendants Cicenia, Corvino and DeMasi were indicted for murder. Before trial the appellant Cicenia applied for an inspection of alleged confessions by the defendants and for an order suppressing his confession on the ground that it had been obtained while he was under arrest without complaint or warrant, without having been advised of his constitutional rights and after having been denied counsel. But cf. State v. Pierce, 4 N. J. 252, 261 (1950); State v. Bunk, 4 N. J. 461, 470 (1950). In addition, leave was sought to take oral testimony in support of the application to suppress. The County Court, after pointing out that the admissibility of the confession may be determined at the trial, questioned its power to suppress it in advance thereof and denied the application in its entirety. Thereupon, and without awaiting trial, appeal was taken to the Appellate Division.

The practice has long been established in our State, as well as elsewhere, of determining the admissibility of a confession at the trial; there the rights of the defendant may be fully protected by having the Court pass on its
52 competency and the jury on its credibility. See State v. Cole, 136 N. J. L. 606, 612 (E. & A., 1947). The same practice has been followed since the adoption of our new Rules (see State v. Pierce, supra; State v. Bank, supra) and we find

nothing therein to support the contention that, upon application, the Court is obliged to determine the admissibility of the confession before the trial. Indeed, although our Rules have in large measure been patterned after the Federal Rules, we have not adopted any counterpart of Federal Rule of Criminal Procedure 41 which specifically permits motions to suppress certain types of evidence before trial. Cf. In re Fried, 161 F. 2d 453, 466 (2d Cir., 1947) cert. dismissed 332 U. S. 807 (1947). It is not our purpose to imply that there is a total absence of power to entertain such motion to suppress before trial; on the contrary, there may well be special situations where the interests of justice will dictate that the issue be determined immediately and in such instances the trial Court ought to do so in the proper exercise of its discretion. Cf. In re Fried, supra. However, nothing whatever was presented by the appellant which suggested any reason for departing from the customary practice of deferring determination of the admissibility of the confession until trial.

The appellant asserts that he has an absolute right to inspect copies of his confession and the confessions of his co-defendants, relying primarily on Rule 2:5-8 (c) which provides that the Court may direct that books, papers, documents or other objects designated in a subpoena be produced before the Court at a time prior to trial. This Rule was taken from Federal Rule of Criminal Procedure 17; we did not adopt Federal Rule 16 which provides that upon motion the Court may
53 order the attorney for the government to permit the defendant to inspect books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process. In Shores v. United States, 174 F. 2d 838 (8th Cir., 1949), the Court held that even under the comprehensive provisions of the Federal Rules the defendant has no absolute right to obtain copies of confessions obtained by the government and the same interpretation is to be given to our Rules. See State v. Bunk, 63 A. 2d 842 (N. J. Co. Ct., 1949), not officially reported. However, the Shores case did recognize that apart from any express Rule the trial Court has inherent discretionary power to compel discovery by the government in advance of trial particularly where the defendant seeks a copy of his confession. In

reaching a similar result the Maryland Court of Appeals in State v. Haas, 188 Md. 63, 51 A. 2d 647 (1947), pointed out that in England the accused is now permitted to see the bulk of the evidence against him before trial and that the trend of modern authority in the United States is to recognize that the trial Judge has discretionary power to approve inspection in advance of trial. In the course of his opinion Chief Judge Marbury said:

"We are not impressed by the fear of the prosecuting attorneys that the exercise of such discretion will change the whole practice of criminal law in this State, or will make the securing of proper convictions more difficult to obtain. It has not apparently had that effect elsewhere and we see no reason why it should have it here. On the other hand, there seems to be a measure of elemental justice in permitting one accused 54 of crime to see a confession alleged to have been made by him, which he expects to be produced against him at his trial. Confessions are not always written exactly as they are made, nor is the most meticulous care always displayed by the police authorities in obtaining and transcribing them. The trial court can be made aware of the particular circumstances surrounding a confession in any particular case, and then determine whether it is in the interest of justice that the defendant should see a copy of it before trial."

In the instant matter the appellant has rested his position entirely upon the erroneous contention that he has an absolute right of inspection; he has not charged that there was an abuse of discretion by the trial Court and, in any event, there is no evidence in the record before us which would support such charge if made. Cf. State v. Bunk, supra, at p. 845.

As we have indicated, the order of the County Court was within the exercise of its discretion; in addition, it was clearly interlocutory (Cogen v. United States, 278 U. S. 221, 73 L. Ed. 275 (1929)) and did not come within the limited classes of interlocutory orders appealable to the Appellate Division. See 4:2–1, 4:2–2; Semenya v. Metals Disintegrating Co., 5 N. J. Super. 363 (App. Div., 1949). Since the appellant's appeal has been presented to and fully argued by the parties before the Appellate Division and they have made no reference to the Supreme Court's certification Rule 1:5–1 (b) in their briefs

nor have they at any time taken any steps thereunder, we have not considered whether the Rule was intended to become applicable at this preliminary stage of the proceeding.

The appeal is dismissed.

55 JUDGMENT OF AND MANDATE ON DISMISSAL

This cause having been duly argued before this Court by Frank A. Palmieri, counsel for the appellant and C. William Caruso, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the Appeal from the order of the said Essex County Court (Law Division) is dismissed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Essex County Court (Law Division) to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Nathan L. Jacobs, Senior Judge, at Trenton on the 17th day of August, 1950.

I. GRANT SCOTT,
Clerk of the Superior Court.

56 NOTICE OF APPEAL TO SUPREME COURT

Notice is hereby given that Vincent Cicenia, defendant, residing at #138 Summer Street, Orange, New Jersey, hereby appeals to the Supreme Court of the State of New Jersey from the final judgment of the Superior Court of New Jersey, Appellate Division, entered on August 17, 1950, dismissing the appeal of the defendant from the order of the Essex County Court (Law Division).

The said Vincent Cicenia, defendant, was indicted with others by the Essex County Grand Jury, 1949 Term, for the crime of murder, the indictment charging that on March 17, 1947, at Newark, they "did wilfully, feloniously and of their malice aforethought kill and murder Charles Kittuah." The

said defendant pleaded "not guilty" to said indictment. While waiting trial this defendant made a motion to the trial judge for an Order (1) directing Prosecutor to produce before trial court for inspection by this defendant and his counsel, prior to trial of the cause, the alleged written confession of this defendant and of the other two co-defendants and (2) to suppress the alleged written confession of this defendant for reasons contained in his notice of motion. This motion was denied en toto by trial judge whereupon this defendant appealed to the Superior Court as aforestated. This appeal is from the judgment of the Appellate Division of the Superior Court, as aforestated.

This defendant has been in custody since December 18, 1949, and is presently confined in the Essex County Jail, Newark, New Jersey.

Dated September 12, 1950.

FRANK A. PALMIERI,
Attorney for Defendant, Vincent Cicenia.

57 *Petitioner's Exhibit No. 2*

Superior Court of New Jersey, Appellate Division

Docket No. ——

IN THE MATTER OF THE APPLICATION FOR THE WRIT OF HABEAS CORPUS OF VINCENT CICENIA, PETITIONER

CIVIL ACTION. ON PETITION FOR THE WRIT OF HABEAS CORPUS, ON APPEAL FROM DISCHARGE OF THE WRIT. SAT BELOW: JOSEPH E. CONLON, J. C. C.

BRIEF AND APPENDIX FOR THE STATE

CHARLES V. WEBB, Jr.,
Essex County Prosecutor and Attorney for Respondent,
Essex County Court House, Newark 2, New Jersey.

C. WILLIAM CARUSO,
Special Legal Assistant Prosecutor,
Of Counsel, on the Brief.

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60 COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Where defendant has failed to perfect his appeal within the time prescribed by the Rules, should not the appeal be dismissed?

2. Assuming, but not conceding, that the arrest was illegal, was not the alleged illegality waived by defendant's voluntary submission to the Court's jurisdiction?

3. Was there an unreasonable delay of arraignment? And if unreasonable, which is not conceded, would a violation of the Rules in that respect vitiate either the confession or conviction which were otherwise legal?

4. Was there a denial of constitutional rights because the defendant was not permitted to consult with counsel between the time of his arrest and arraignment? If the confession was never made use of at any trial, because defendant entered a voluntary plea of non vult to the indictment, can defendant now complain of denial of constitutional rights in connection with his confession by way of habeas corpus proceedings?

61 COUNTERSTATEMENT OF THE CASE

We deem it advisable to give this Court a comprehensive picture and antecedent history of the case.

Vincent Cicenia, hereinafter referred to as the defendant, together with Arinando Corvino and John DeMasi, were jointly indicted by the Essex County Grand Jury, 1949 Term, for the crime of murder, upon an indictment charging that on March 17, 1947, at Newark, they "did wilfully, feloniously and of their malice aforethought kill and murder Charles Kittuah," etc.

The killing was done in an attempt to commit robbery; and the killers immediately escaped from the scene of the crime, which remained unsolved until the arrest of all three defendants in December, 1949.

Police investigation first led to the arrest of Corvino and DeMasi, and their arrest led to the questioning of this defendant Cicenia.

On December 18, 1949, while Corvino and DeMasi were being questioned in Newark Police Headquarters, the defendant Cicenia, in response to a police request, appeared at Orange Police Headquarters and he was immediately turned over to the Newark Police for investigation. While all three were being questioned at Newark Police Headquarters, Mr. Frank A. Palmieri, an attorney, appeared at headquarters, stating he had been retained to represent Cicenia and he demanded permission to consult with his client.

The attorney was permitted to see and consult with his client immediately upon completion of the police investigation on the same evening, Sunday, December 18, 1949, at about 9:30 P. M.

All three defendants were arraigned before the Magistrate in the Second Criminal Court of Newark on the following morning, December 19, 1949, on a complaint for murder; the Magistrate properly advised them of their rights in compliance with Rules 8:3-3 of Criminal Practice in Local Criminal Courts (now R. R. 8:3-3 (b)); and defendants were remanded to await action of the Grand Jury, without bail.

62

On March 3, 1950, before trial, Cicenia's counsel argued a motion before Honorable Joseph E. Conlon, Essex County judge, requesting a pre-trial inspection and suppression of Cicenia's confession, and the motion was denied.

On appeal from said order, this Court dismissed the appeal (see State v. Cicenia, 9 N. J. Super. 135, App. Div. 1950).

On appeal therefrom, our Supreme Court held that defendant did not have the absolute right to a pre-trial inspection of his alleged confession nor of those of his co-defendants, and that the trial court did not have the right to order suppression

of his confession under the Rules of Criminal Practice (see State v. Cicenia, 6 N. J. 296, 1951).

On March 26, 1951, the date fixed for trial of the indictment, all three defendants, by their respective counsel, offered pleas of non vult to the indictment, which was consented to by the Prosecutor and accepted by the Court (see Appendix).

On April 18, 1951, all three defendants were sentenced by Honorable Joseph E. Conlon, Essex County judge, to life imprisonment in the State Prison where they are now confined (see Appendix).

Thereafter, in December, 1953, defendant filed an application for a writ of habeas corpus which was referred to Judge Conlon, who issued the writ and assigned counsel to defendant (Mr. James C. Conlon).

On January 21, 1955, after hearing, and following argument of counsel, Judge Conlon concluded and determined that the grounds advanced by defendant; namely, that there was an unlawful arrest; and that there was an unreasonable delay of arraignment; and that there was a denial of counsel between the time of arrest and arraignment, afforded no basis for defendant's discharge by way of habeas corpus; and on the same date, January 21, 1955, the Court entered an order discharging the writ (see Defendant's Appendix).

63 Defendant now appeals to this Court from said order of Judge Conlon, claiming substantially the same grounds advanced in his application for the writ in the Court below; namely, (1) that the arrest was without warrant and therefore illegal; (2) that there was unreasonable delay of arraignment; and (3) that he was denied counsel between the time of arrest and arraignment.

ARGUMENT

POINT I. DEFENDANT HAS FAILED TO PERFECT HIS APPEAL WITHIN THE TIME PRESCRIBED BY THE RULES AND SHOULD BE DISMISSED

Judge Conlon entered an order discharging the writ of habeas corpus on January 21, 1955.

Defendant filed his Notice of Appeal in the Essex County Clerk's Office on March 12, 1955, 50 days after the filing of the Order of discharge.

Defendant filed his brief with this Court on May 13, 1955, 62 days after the filing of the notice of appeal.

It is provided in R. R. 1:3–1, adopted as R. R. 2:3 of the Appellate Division:

"Where an appeal is permitted, it shall be taken to the appropriate appellate court within the following periods of time after entry of the judgment, order or determination appealed from:

"(b) 45 days—final judgments of all courts except (naming exceptions) * * *"

And under R. R. 1:7–12 (a) of the Supreme Court, adopted as R. R. 2:7–3 of the Appellate Division, it is provided:

"*Within 30 days after the filing of the notice of appeal* * * * the appellant shall file with the clerk of the appellate court (certain designated number of copies of the appellant's brief) * * * [Italics ours.]"

64 It is established that in a habeas corpus proceeding the order discharging the writ is the final judgment; and under the above-quoted Rules, an appeal must be taken to the appropriate appellate court by filing the notice of appeal "within 45 days" from final judgment, and by filing the appellant's brief "within 30 days" after the filing of the notice of appeal. See State v. Payne, 17 N. J. Super. 561, App. Div. 1951; State v. Rivers, 16 N. J. Super. 159, App. Div. 1951; State v. Janiec, 6 N. J. 608, 1951; In re Kershner, 9 N. J. 471, 1952).

Here the notice of appeal was not filed until 50 days after the final judgment; and the appellant's brief was not filed until 62 days after the filing of the notice of appeal.

Defendant failed to perfect his appeal within the time-limit prescribed by the Rules, and the appeal should be dismissed.

However, we shall proceed to discuss the questions presented on the merits.

POINT II. ANY ILLEGALITY OF THE ARREST WAS WAIVED BY DEFENDANT'S VOLUNTARY SUBMISSION TO THE JURISDICTION OF THE COURT

The murder was committed on March 17, 1947, and the crime remained unsolved until December 18, 1949, when Corvino and DeMasi, the two confederates of defendant, were questioned by the Newark police and they implicated the defendant.

On the morning of December 18, 1949, the Orange police were requested by the Newark police to take into custody this defendant, who was a resident of Orange. The Orange police notified the defendant to call at Orange Police Headquarters and he did so. Thereupon the Orange police took defendant into custody and turned him over to the Newark Homicide Squad at Newark Police Headquarters for questioning.

65 The Newark police conducted an investigation during Sunday, December 18th, which involved the questioning of all three accused, the summoning and questioning of witnesses, the holding of line-ups, and the taking of written statements.

Defendant's written confession was taken during the afternoon and early evening of Sunday, December 18, and completed at about 9:30 P. M.

At about 11:00 A. M. of the following day, Monday, December 19, 1949, all three defendants were arraigned before the Magistrate upon a complaint for murder.

This is what the Court below said on the legality of the arrest and, we think, properly so (p. 13 of defendant's appendix relating to hearing of January 21, 1955):

"The Court: I am going to dispose of this matter now. I do not want you to think I am deciding it precipitously, because I have given it considerable thought, and I am going to decide it with the reservation that I may edit my reasons at my leisure if I see fit.

"There are three grounds for this application. The first is that the defendant was illegally arrested. In that respect it is admitted that he surrendered himself to the police authorities

in Orange and thereafter was held in Orange. I decline to hold that the arrest was illegal, because he was held on a murder charge, which is a felony. The police under those circumstances had a right to hold him. * * *"

It is undisputed that at no time during the entire proceedings, did defendant question the legality of his arrest.

Defendant submitted to the jurisdiction of the court throughout the entire proceedings from the time of his arrest to the time of his sentence, and any illegality in connection with the arrest, the illegality of which we do not concede, was thereby waived.

On this point, it is stated in State v. Mangino, 17 N. J. Super. 587, 589 (App. Div. 1952):

"The failure to issue a warrant authorizing an arrest
66 is a defect curable by waiver. * * * The record does not disclose whether Mangino was sentenced on a plea of guilty or plea of non vult or whether after trial. But, in any case, he submitted to the jurisdiction of the court without questioning the propriety of his arrest. In that circumstance he waived the alleged omission to issue a warrant and he may not now complain of the defect."

See, also, State v. Keller, 137 N. J. L. 637 (Sup. Ct. 1948); State v. Baker, 102 N. J. L. 349 (E. & A. 1926).

Here, the record shows that defendant was represented by counsel when he entered a plea of non vult to the indictment for murder, and at the time of his sentence.

He voluntarily submitted to the court's jurisdiction throughout the entire proceedings from the time of his arraignment before the Magistrate down to the time of his sentence without ever questioning the legal propriety of his arrest without warrant.

Under these circumstances, in addition to the fact that the arrest was on a charge of murder, a felony, and that such an arrest is not illegal when made without warrant, the voluntary submission to the court's jurisdiction constituted a complete waiver of any illegality of the arrest (State v. Mangino, supra; State v. Keller, supra; State v. Baker, supra).

POINT III. THERE WAS NO UNREASONABLE DELAY OF ARRAIGNMENT; AND THE ALLEGED DELAY, ASSUMING IT WAS UNREASONABLE, DID NOT VITIATE EITHER THE CONFESSION OR THE CONVICTION

Defendant surrendered to the Orange police on Sunday morning, December 18, 1949.

One of the claims of defendent is that he was not arraigned before a Magistrate on the complaint for murder until 26 hours later, on Monday, December 19th at 11:00 A. M.; that this was an unreasonable delay in violation of the Rules of Practice and Procedure; and therefore his conviction was thereby rendered null and void.

67 On this point, the Court below said (p. 13 of defendant's appendix relating to the hearing of January 21, 1955):

"• • • Whether they did not, or whether there was a delay in his arraignment until the next day, which I understand there was, has been repeatedly held to be no ground for a writ of habeas corpus after a conviction or appeal. The most recent case in that respect is the State v. Pierce, 4 N. J., at page 252. I think that matter is too well settled to require any further discussion."

The arrest took place on Sunday morning, December 18, 1949. After defendant was turned over by the Orange police to Newark police headquarters, the members of the Newark Homicide Squad devoted the greater part of that day and evening to an investigation, the questioning of all three defendants, the questioning of witnesses, the holding of line-ups, and the writing of statements, confessions, etc.

Defendant's confession was completed at about 9:30 P. M., after which his attorney was allowed to see and consult with him; and defendant was arraigned before the Magistrate the following morning at about 11:00 A. M.

In the first place, we do not consider that there was any unreasonable delay in the arraignment, and there was a sufficient compliance with the pertinent Rule (formerly R. 8:3–3 (a) and R. 2:3–3 (a); now R. R. 8:3–3 (a) and R. R. 3:2–3 (a).

Under any circumstances, it is the established rule that a violation of a procedural rule, standing alone, will not vitiate a confession otherwise voluntarily given; and a delay in arraignment will not impair a conviction which is otherwise valid. (State v. Cynkowski, 10 N. J. 571, 578, 1952; State v. Schmieder, 5 N. J. 40, 45, 1950; State v. Pierce, 4 N. J. 252, 263, 1950).

68 POINT IV. THERE WAS NO DENIAL OF CONSTITUTIONAL RIGHTS BECAUSE DEFENDANT WAS NOT PERMITTED TO CONSULT WITH COUNSEL BETWEEN THE TIME OF HIS ARREST AND ARRAIGNMENT; AND SINCE THE CONFESSION WAS NEVER MADE USE OF BECAUSE OF DEFENDANT'S VOLUNTARY PLEA OF NON VULT TO THE INDICTMENT, HE CANNOT NOW COMPLAIN OF DENIAL OF CONSTITUTIONAL RIGHTS IN CONNECTION WITH THE TAKING OF HIS CONFESSION

a. As to right to counsel between arrest and arraignment

Defendant claims he was denied his constitutional rights because he was not permitted to see and consult with his counsel on Sunday afternoon, December 18, 1949, while the police authorities were investigating the crime, and during the period he was being questioned and his confession was being taken in Newark Police Headquarters.

It is undisputed that he was permitted to see his counsel after his confession had been completed on Sunday evening, December 18, 1949, at about 9:30 P. M., and that he was arraigned the following morning at about 11:00 A. M.

At the arraignment, defendant was represented by counsel and his rights were protected by having a plea of not guilty entered for him; and following the arraignment defendant was represented by counsel at every step of the proceedings down until the time of his sentence on April 18, 1951.

This is what the Court below stated with respect to the claim of denial of counsel during the police investigation and questioning (p. 14 of defendant's Appendix as to hearing of January 21, 1955):

"The third point is that he was denied counsel between the time he was taken into custody and until the night be-
69 fore he was arraigned in Court. I find that is no ground for the allowance of this writ, because there was no prejudice accruing to him by reason of his failure to have counsel at that time. A plea of not guilty was entered for him at the arraignment, and his rights were preserved until after he was indicted and the case took its regular course."

On the question of an accused's right to counsel, it is firmly established in our law that an accused is entitled to the aid and assistance of counsel for his defense at the trial, and not during the period between his arrest and arraignment (State v. Grillo, 11 N. J. 173, 1952; State v. Murphy, 87 N. J. L. 515, 528–531, E. & A. 1915; State v. Bunk, 4 N. J. 461, 470, 1950, cert. den. 340 U. S. 839, 71 S. Ct. 25, 1950; State v. Cole, 136 N. J. L. 606, E. & A. 1948, cert. den. 334 U. S. 851, 68 S. Ct. 1503).

b. As to the confession

As to defendant's claim that his confession had been procured by the police through coercion and physical abuse, we deem it sufficient to state that defendant could have objected to it if he had gone to trial and if and when the State would have offered it in evidence at the trial. But there was no trial and the confession was never proffered by the State. The defendant entered a voluntary plea of non vult to the indictment on March 26, 1951, when he was represented by counsel; and the plea was consented to by the Prosecutor and approved and accepted by the Court (See Appendix).

There never was any use made of the confession. The legality of the confession was never an issue at any trial; and defendant cannot now make any issue thereof by way of habeas corpus proceedings.

It has been held that, where the defendant pleads guilty to the indictment, he cannot thereafter claim a denial of his constitutional rights on the basis of his confession or the manner in which it was procured.

70 In In re Domako, 20 N. J. Super. 314 (App. Div. 1952), a habeas corpus proceeding involving this same question, this Court stated (p. 316 of opinion):

"Much of the appellant's brief is made up of quotations from cases which held that confessions of a defendant, obtained by coercion or under other circumstances which amounted to a denial of constitutional rights, are inadmissible in evidence. Such cases have no application here. As pointed out above, this defendant pleaded guilty and if confessions were made by him, no use was ever made thereof."

So, here, if defendant's confession had been obtained, as he claims, by unlawful means and under such circumstances as to amount to a denial of constitutional rights, the confession was never made use of, since defendant entered a plea of non vult to the indictment, and consequently he cannot now avail himself of any claim of denial of constitutional rights in connection with his confession.

Conclusion

We respectfully submit that defendant's appeal should be dismissed for the reasons hereinbefore stated under our Point I, and for the reasons stated in our Points II, III and IV, the Order of the Court below should be affirmed.

Respectfully submitted.

Charles V. Webb, Jr.,
Essex County Prosecutor and Attorney for Respondent,
Essex County Court House, Newark, New Jersey.

C. William Caruso,
Special Legal Assistant Prosecutor,
Of Counsel, on the Brief.

71 Appendix

PROCEEDINGS OF MARCH 26, 1951, WHEN PLEAS OF NON VULT WERE ENTERED

Essex County Court, Law Division, Newark, New Jersey,
Monday, March 26, 1951

THE STATE OF NEW JERSEY

v.

ARMANDO CORVINO, VINCENT CICENIA, AND JOHN DEMASI, DEFENDANTS

ON INDICTMENT NO. 103 FOR MURDER. PLEA OF NON VULT

Before Honorable JOSEPH E. CONLON, Judge

Appearances: James R. Giuliano for the State; Sam A. Colarusso for the defendant Armando Corvino; Frank A. Palmieri for the defendant Vincent Cicenia; Leon W. Kapp for the defendant John DeMasi.

(2) Mr. Palmieri: If your Honor please, on behalf of Vincent Cicenia, whom I represent, application is herewith made to the Court for leave to retract his plea of not guilty to the indictment at bar and for permission to permit him to enter a plea of non vult.

72 Mr. KAPP. If your Honor please, on behalf of the accused, John DeMasi, we beg to withdraw the plea of not guilty and enter a plea of non vult.

Mr. COLARUSSO. Your Honor, on behalf of the defendant Armando Corvino we ask the Court's permission to withdraw our plea of not guilty and enter a plea of non vult to the indictment.

The COURT. What does the Prosecutor have to say about it?

Mr. GIULIANO. Your Honor, before accepting the plea I would like to bring to your Honor's attention some of the facts and circumstances surrounding the alleged murder.

It appears that these three men became acquainted some time prior to the date of the murder, which was on March 17, 1947, and on the day in question or the evening in question they had met in a restaurant or luncheonette in the city of Orange known as Gamba's. And there Corvino and Cicenia had arranged to go out to pull a job, as was stated between them. It is claimed (3) by the State that DeMasi learned of this arrangement and asked both Corvino and Cicenia if he could go along.

At the time the defendants Corvino and Cicenia had in their possession two guns. The three then got in DeMasi's automobile, DeMasi driving. Corvino was seated next to him, and Cicenia was in the rear seat. They then came to the northern section of Newark, known as the North Newark section, and went into Belleville, looking for a place to hold up. They came back to Newark after being in Belleville, and were driving on Summer Avenue. They parked their car on Summer Avenue and they noticed a grocery store which was located next to a dry-goods store owned and operated by the deceased, Charles Kittush, and there in the car it was arranged that Cicenia was to go into the grocery store for the purpose of looking it over. And he went into the grocery store and there found behind the grocery store there were living quarters and there were
73 also some people in the grocery store, and before leaving he purchased a package of cigarettes. He returned to the car, in which were seated DeMasi and Corvino, and Corvino asked Cicenia what he thought of the place, meaning the grocery store. Corvino stated that in his opinion it was a good place to hold up, but he would not advise it, because there were too many people in and about the premises.

(4) It was then determined that Cicenia would go into the drygoods store and that he would ask to be shown some shirts or a shirt, and that he did. He went into the drygoods store on the pretense of purchasing a shirt, and he was shown some shirts by the deceased, Charles Kittush, and after that he returned to the car and there had a conversation with Corvino. Corvino then stated to him in the presence of the other defendant, "Let's pull the job," or words to that effect.

The State claims that Corvino and Cicenia left the car together with DeMasi; that they crossed the street; and that DeMasi was to be the lookout, and he was to stay back a short distance from the drygoods store.

Corvino and Cicenia entered the store, each armed. Cicenia went behind the counter, and Corvino is alleged to have stated, "This is a stick-up." Mr. Kittush was in the store at the time. He was a man forty-six years of age. It is claimed that he stated to Corvino, "What is this? A joke?" or words to that effect. And with that he started to move toward

Cicenia, and when he came close enough to him he slapped Cicenia and kept going toward him, and Cicenia warned him not to come any farther. And at that time Cicenia had the gun in his hand, which Cicenia claims he had received from Corvino. As Mr. Kittush came toward Cicenia he fired a shot, which (5) struck the decedent in the groin, going through his body. Cicenia claims he then jumped over the counter and noticed Corvino and Kittush tussling. Corvino is alleged to have yelled, "Grab the money," or "Grab the dough." Cicenia then went to a box or a drawer and pulled out some
74 bills and a twenty-five cent piece, I believe, as the statements will indicate. Cicenia then withdrew, and as he is withdrawing, the deceased had his back toward him. Cicenia still had the gun in his hand, and he again fired, striking Mr. Kittush, the deceased, in the back, and that bullet went through the body. With that, Corvino is supposed to have stated, "Let's get the hell out of here." And they both left, and as they did they noticed DeMasi a short distance up from the drygoods store. They both walked very fast to the car and then started the motor. Or the motor, I should say, was running, as the statements will indicate. They got in the car, and at a fast rate of speed left the scene.

This shooting occurred at about 8:20 p. m. The deceased was removed to the City Hospital that evening, and died some time around 9:20 p. m.

The murder occurred, as I said before, at the place of business of Charles Kittush, at 819 Summer Avenue, Newark, New Jersey.

(6) The police continued their investigation, after being called to the scene, and some time after the alleged killing Corvino was brought in for questioning, and thereafter released. And it was not until December 17, 1949, that Corvino had had some difficulty with his wife in the city of Orange. Both the defendant Corvino and his wife were brought to police headquarters, and on information given to the police by the wife, the defendant Corvino was questioned. And at that time police ascertained that the other two men involved were the defendants Cicenia and DeMasi.

There are no eyewitnesses to the murder, your Honor, and the State must rely solely, if this case went to trial, on the statements which the defendants gave to the police after their apprehension. The State feels that it would be difficult to convince a jury to return a verdict of guilty of murder in the first degree, which would mean the death penalty, 75 from the facts that it has or the evidence that it has in its possession. As I said before, there are no eyewitnesses to this killing, and the only evidence that the State has against these three defendants; that is, direct evidence, would be their own statements. In view of that fact and of those circumstances that I have just related, I feel that the State should recommend the acceptance of a plea (7) of non vult by each of these defendants to the indictment.

The COURT. How old are you, Corvino?

The Defendant CORVINO. Twenty-seven.

Mr. GIULIANO. I might state, your Honor, he was twenty-three at the time of the commission of the crime.

The COURT. This happened when?

Mr. GIULIANO. March 17, 1947.

The COURT. You are twenty-seven now, Corvino?

The Defendant CORVINO. Yes, sir.

The COURT. How old are you, Cicenia?

The Defendant CICENIA. Twenty-two, your Honor.

Mr. GIULIANO. He was eighteen, I believe, when the crime was committed.

The COURT. DeMasi, how old are you?

The Defendant DEMASI. Twenty-six.

Mr. GIULIANO. He was twenty-three at the time.

The COURT. You three understand that by entering these pleas you are liable to any sentence the Court imposes up to life imprisonment? Do you all three understand that?

The Defendant CORVINO. Yes, your Honor.

The Defendant CICENIA. Yes.

The Defendant DEMASI. Yes, sir.

The COURT. You also understand there will be no (8) commitment by the Court or no recommendation by the Prosecutor as to your sentence, as to any leniency? You all understand that when you enter the pleas?

The Defendant CORVINO. Yes, sir.

The Defendant CICENIA. Yes.

The Defendant DEMASI. Yes.

76 The COURT. The pleas will be accepted. Sentence day will be April 18th.

Mr. GIULIANO. Armando Corvino, Vincent Cicenia, and John DeMasi, I understand that each of you desire at this time to retract your plea of not guilty to this indictment, which I will read to you, and that you and each of you desire to enter a plea of non vult. Is that so Armando Corvino?

The Defendant CORVINO. Yes, sir.

Mr. GIULIANO. Is that so, Vincent Cicenia?

The Defendant CICENIA. Yes, sir.

Mr. GIULIANO. Is that so, John DeMasi?

The Defendant DEMASI. Yes, sir.

Mr. GIULIANO. You are pleading non vult to this indictment, which reads as follows: "Essex County, to wit: The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath, present that Armando Corvino, Vincent Cicenia, and John DeMasi, on the 17th day of March, 1947, at the City of Newark, in (9) the County of Essex, aforesaid, and within the jurisdiction of this Court, did wilfully, feloniously, and of their malice aforethought kill and murder Charles Kittush, against the peace of this State, the government and dignity of the same."

Is that so, Armando Corvino? You are pleading non vult to this indictment? Is that so?

The Defendant CORVINO. Yes, sir.

Mr. GIULIANO. Is that so, Vincent Cicenia?

The Defendant CICENIA. Yes, sir.

Mr. GIULIANO. Is that so, John DeMasi?

The Defendant DEMASI. Yes, sir.

Mr. GIULIANO. I move the acceptance of each plea, your Honor.

The COURT. The pleas will be accepted.

I might say to counsel they will have the opportunity to present to the probation office any information they want to bring to the attention of the Court.

77 PROCEEDINGS OF APRIL 18, 1951 WHEN SENTENCES WERE IMPOSED

Essex County Court, Law Division, Newark, New Jersey, Wednesday, April 18, 1951

THE STATE OF NEW JERSEY

v.

ARMANDO CORVINO, VINCENT CICENIA, AND JOHN DEMASI, DEFENDANTS

ON INDICTMENT NO. 103 FOR MURDER. SENTENCES

Before Honorable JOSEPH E. CONLON, J. C. C.

Appearances: Sam A. Colarusso for the defendant Armando Corvino; Frank A. Palmieri for the defendant Vincent Cicenia; Leon W. Kapp for the defendant John DeMasi.

(2) Mr. Colarusso: If it please your Honor, on the day that we entered our plea, your Honor suggested that we contact the Probation Office and submit any information that we thought might be helpful in determining the sentence in this matter.

On behalf of Armando Corvino I have consulted with the Probation Office and have given them anything that I thought might be helpful. I have a fairly good idea of

78 what their recommendation in this case will probably be, and for that reason I am going to take a few minutes of the Court's time to call the Court's attention to certain facts which I think are important and that might result in the Court's giving a lesser sentence or, let's say, a term of years instead of life.

Now, at first glance, one might say: What justification can there be for murder, or what can be said on behalf of an individual who participated in a hold-up that ended up in the taking of the life of an innocent person? With that point in mind, I would like, for a few moments, to review the life of this boy.

I believe he is about 26 years old at this time. He was born in Berwick, Pennsylvania, one of eighteen or nineteen children. I think there are fifteen children living. At the age of 18, at

which time, although he (3) had been brought up in poverty and although he had lived in sections of the City of Newark where crime generally prevailed, Armando had kept himself clean. He had been a member of the Boy Scouts. During the depression he joined what was known as the National Youth Administration and worked in some of the reforestation projects, and became a member of the State National Guard. We find that at the age of 18, Armando volunteered and went off and joined the Army. After his basic training, in the early part of 1942, while out in Kansas, a request was made to his outfit for volunteers to go overseas, and Armando was one of the first to volunteer. And as a result he went with the American Forces to Africa. I am not going to review his military record, because it is very lengthy. Briefly, I want to say this, as Armando put it to me one day during one of our many conferences we have had during the past fifteen months:

He said, "I carried a machine gun from Africa to France."

His discharge, which is part of the record, I understand,
79 in the Probation Department, shows that he was wounded on six separate occasions, and that he received a dozen or more wounds during that time. He was decorated with the Purple Heart, I think, six times. (4) I am not certain about that. My recollection is that it was five or six times. He was also cited and received what I believe is known technically as four oak leaf clusters. There was a special decoration or citation given to Armando because at one time, when there weren't any reserves, he was wounded in action, and he was cited because he reported to the battalion medical station, but he was not evacuated, due to the fact that there were no replacements, and he fought for two more weeks with his wound, which was a serious wound. And eventually when the battle was over victoriously for our boys, he was sent to a hospital. Your Honor might in your mind say, "That is fine; he has had a wonderful war record; he went all through Africa; he went all through Europe; he was wounded and he was decorated, but what has that got to do with his participating in this crime?"

Under the statute your Honor has the right in a case of this type, where a plea is taken to the indictment, to either

sentence to life or sentence in accordance with the provision of the section relating to second degree murder, which means that your Honor can sentence anywhere from not ing, we will say, up to thirty years.

What would a sentence of less than life serve in (5) this case? During my career as an attorney, and before, at school, and since, I have read some periodicals concerning the rehabilitation of criminals, the rehabilitation of individuals who unfortunately got themselves mixed up with the law. Here is a boy who, until he was 18 years of age, had an exemplary record. I talked with one of his teachers from the Newton Street School. She remembers all of the Corvino boys, and there were a lot of them, and she particularly remembered Armando because, as she said, he was one of the best boys around the school and always behaved.

80 Now, if Armando Corvino at 18 was such a boy who did complete grammar school, who did go one year to high school, I believe, and then due to economic circumstances went to work and was working in a foundry or a factory at the time he went into the service, sending Armando to State's Prison and a life sentence, I personally feel, will avail nothing. The result will be that after the required number of years or at whatever time he is released, he can become or probably will become a hardened, bitter individual.

I believe in this case your Honor should sentence him to a number of years—a reasonable number of years—during which he can be rehabilitated.

(6) Now, your Honor, during the past fifteen months I have spent at least one hour or two a week with Armando. I sat up there with him, talked with him, went through his entire life. In fact, together we went across Africa, across Europe and I believe that I probably understand Armando and his mind today better than any other individual, having been that close to him. I see a lot of good in Armando, and all he talks about is what he is going to do when he comes out. He realizes that what he did was a foolish thing. He did not need the money. Due to a 65 per cent or 75 per cent disability Armando had received, I believe, $160, $170 or $180 a month from the

Government. He was employed. It was just one of these silly things that boys will do once in a while.

I am certain that if Armando is sent away and within a reasonable time rehabilitated, we will have a citizen, a decent citizen, the way Armando would have been had he not gotten into this mess.

I realize I am asking this Court for an awful lot. I realize a life has been taken, and I realize the attitude of the Public—an eye for an eye and a tooth for a tooth—but I believe today the thought in probation departments and in social agencies is rehabilitation of (7) the individual and not satisfaction in punishing people.

Thank you very much.

The Court. All right, Mr. Colarusso.

Mr. Palmieri. If your Honor please, as you well know, I represent Cicenia the second defendant named in the indictment.

Cicenia is now 22 years of age. At the time this crime was committed he was 18 years of age. There is no excuse for murder, there is no justification for murder. There is no apology being made for this defendant or any of these defendants for their acts.

I would like to say to the Court that in the last sixteen or seventeen months while this case has gone through the various courts, it was never the intention or the desire of this defendant or of myself to have Cicenia ever escape the punishment of the law. It was never my intention that he should be discharged and let go free. He participated in this crime, he participated in the murder, and he wanted to pay a just penalty. And it was only because of the offer of a just penalty being permitted or offered with these various legal propositions brought about at this time, I think after some fifteen or sixteen months, with perhaps a change of administration in the Prosecutor's office, and so forth, that they have (8) seen the various presentments we made to them, they have seen our side of the picture, and they permitted this boy to plead to the indictment at bar.

This murder, this crime would have never been committed if it hadn't been for Corvino. Now, I do not say that I blame

Corvino, because I want to reserve that until I complete my remarks, because Corvino is only a product or a by-product of the war. Here is a man who killed twenty-three of the enemy at one machine gun blast in one of the many battles that he was in; who was taught how to kill and murder, who did kill and murder for years and years. And then that good Army of ours saw fit, upon his discharge, to appraise
82 his disability at 90 per cent of total and discharge him because he was psychotic, without any rehabilitation of any kind. They sent him home and said, "Go on home and carry on from there." Corvino was never untaught to kill; Corvino was never untaught to murder. Right now, Corvino will kill and will murder, from our conversation with him, because he doesn't think there is anything wrong. Even sending him to jail, perhaps, or to prison, won't cure that situation.

Now, whose fault is that? Where does the responsibility lie? It is the responsibility of Society, it (9) is our responsibility, because we do not provide for kids of this kind, when they come back, an opportunity to rehabilitate themselves and go back into society. I say that to your Honor sincerely. I have been through that same kind of action. I was more fortunate than Corvino perhaps. But you are taught to kill, you are taught to murder without sympathy, without tears. Some of us went in with a college background and came out with a college background. We were able to face the situation, and perhaps not with as much venom. This boy never had that advantage. So that he comes back. And when he comes back into our fair city of Orange, what does he do, this bad apple, because of no fault of his own? And I knew Lucky Corvino before this thing happened; he lived but a few doors away from me. He talks to this kid, 18 years of age, the hero of the war, who flashes his ribbons and his medals and his clusters. He falls for it, because when our war was going on—this happened in 1947—this boy was 13, 14, 15, 16. He tried to join up once, but he couldn't make it because he was too young. He then went for a fellow like Corvino. He is a big shot. He had a brother of his own in the Service. Cor-

vino talked him into going on this job. Corvino, to whom a weapon meant nothing, (10) supplied two guns. It was a very stupid enterprise, I would say, when five dollars or six dollars was involved. They did not try to hold up a
83 bank or try to hold up any place where something might be worth while—a very stupid endeavor to say the least.

If your Honor please, along those lines, I would say this: If General Lucius Clay and his successors in Germany can forgive or can pardon or can discharge from prison or can give a term of years to the likes of Ilse Koch and the likes of the Beast of Belchen and the Beast of Buchenwald, I say to your Honor here in America, where this business happened as a direct result of World War II, do not send these boys to prison for life. They are young. These boys stand before your Honor. Does he look like a murderer? He is a baby, just a kid.

Find out what happened in jail. What did he turn to in jail? He turned to religion, number one; number two, he became an artist. His drawings are available to the Probation Department. They are something to behold. Is that the type of character that is supposed to go away for the rest of his life?

If your Honor please, I realize that a man was killed in the perpetration of a robbery. Yes, in the (11) normal case they should go to the chair, and if there are any extenuating circumstances, in the judgment of the jury and the Court, they should get life. But I believe, and I believe it right from within my very soul, that this thing would have never happened if it hadn't been for Corvino. Corvino is not to be blamed for it; we should be blamed for all of it. And I say this boy, of a fine respectable family, a beautiful family; should not have to pay the extreme penalty that the law provides, and I ask your Honor to consider all those things in passing sentence upon the defendants.

The COURT. All right.

Mr. KAPP. May it please your Honor, this is just a bad dream—no rhyme or reason why these boys should be here. It is just a matter of sheer stupidity. And speaking for my client, John De Masi, based upon the investigation which I

have made in this case, I am satisfied that De Masi was goaded into going along with these boys on this occasion.

84 De Masi was gainfully employed at the time that this occurred, and worked for a long time prior thereto since his discharge from the Service. He has never been unemployed and has worked since this incident occurred on March 17, 1947. De Masi, at the time of (12) the occurrence, was employed by The Lionel Corporation and had a good work record. Since that time he was employed by Lee Brothers as a carpenter, doing construction work.

I am convinced in my own mind, too, that when he was approached at Gamba's restaurant, which is the place from where these boys started that night, that it was with the idea that he had an automobile and that these boys asked him if he would drive them to Newark, because someone was indebted to them and they wanted to collect this debt. It was while they were en route that there was some conversation about taking a place, and then it was that Corvino exhibited one of his guns. None of these boys realized the implications of what they were about to do. They were all just a bunch of kids and, as I say there was absolutely no rhyme nor reason for this.

Might I say that my boy, De Masi, enjoys a splendid war record, was honorably discharged, and after being discharged and returning to his home, became a member of the Marine Corps Reserves, and served in the 21st Battalion Marine Corps Reserves right up to the date that he was arrested in this case.

If your Honor please, this boy is a solid citizen. (13) Since this occurred he married a very lovely girl. He comes from a fine family, and he has a child that was born in January 1950. The child is a year old.

This is really a case where the Court can do some good from the standpoint of rehabilitation, because here you have something to work with. If your Honor please, there is every justification in the world to giving these boys a sentence of years rather than to impose a life sentence. Give these boys

85 the opportunity for rehabilitation, and I am sure that they will all prove to be model prisoners and deserve the consideration of this court.

The COURT. I am, of course, impressed by the earnest pleas of you counsel. There are some cases that come before the Court in which the phase of rehabilitation does not enter, and this is one of them.

Here was a defenseless man killed in an armed robbery. I know that the Prosecutor hesitated in recommending the acceptance of a plea of non vult to the indictment, rather than submitting the case to the jury for the determination of whether there should not be the death penalty. The Court, in turn, hesitated in accepting the plea, feeling that there were a lot of reasons why it should have been submitted to a jury, (14) in the due course of justice, for the determination of whether or not a life sentence should not be imposed.

I think that much of what counsel has said influenced the Prosecutor in recommending the acceptance of the plea, and I think when that recommendation was made by the Prosecutor and was accepted by the Court, all of the considerations that these defendants were entitled to were afforded them. For those reasons the Court cannot feel justified in extending any leniency.

As to each defendant, the sentence will be imprisonment at hard labor for life in State's Prison.

1 In United States District Court for the District of New Jersey

Civil No. 274–56

IN THE MATTER OF THE APPLICATION OF VINCENT CICENIA, FOR A WRIT OF HABEAS CORPUS

TRENTON, NEW JERSEY, *April 24, 1956.*

Transcript of hearing

Before Honorable PHILIP FORMAN, C. J.

Appearances: C. William Caruso, Esq., Assistant Prosecutor of Essex County; Dickinson R. Debevoise, Esq., Attorney for Petitioner.

9 VINCENT CICENIA, the petitioner, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. DEBEVOISE:

Q. Mr. Cicenia, where are you presently confined?

A. The Rahway Prison Farm, Rahway, New Jersey.

Q. For how long a period have you been confined in Rahway Prison Farm?

A. Almost two years.

Q. Were you previously confined in other state institutions?

A. The New Jersey State Prison in Trenton.

Q. Mr. Cicenia, when were you born?

A. September 16, 1928.

Q. And what are the names of your parents?

A. My father's name is Angelo Cicenia and my mother's name is Rachel Cicenia.

Q. Do you know the nationality of your parents?

A. My mother was born in Pennsylvania of this country, and my father was born in Italy.

Q. Is your father now a citizen?

A. Yes; he is.

Q. Do you know when he came to this country?

The COURT. Does it make any difference?

Mr. DEBEVOISE. Your Honor, I think this is part of the background to show the petitioner's background.

10 Mr. CARUSO. I will not object. Get down to the meat of it.

The WITNESS. He came at the age of 16.

Q. Do you have any brothers or sisters?

A. I have four brothers and three sisters.

Q. When did you commence school?

A. I commenced school in New Jersey at the proper age and I went to the various grade schools.

Q. Where did you go to grade school?

A. I went to the Lincoln Avenue school, Park Avenue school.

Q. Where are these located?

A. All in Orange, New Jersey.

Q. Through what grade of school did you go?

A. I eventually went to and graduated from the Orange Vocational School. I had two years of that.

Q. What does that mean in term of conventional classification of classes, what grade?

A. That would be the tenth grade.

Q. The last year of vocational school would be your tenth grade?

A. Yes.

Q. What organization and youth groups were you a member of in your youth?

Mr. CARUSO. Is that necessary?

The COURT. Just background?

11 Mr. DEBEVOISE. Yes.

Mr. CARUSO. Organizations, I do not know what that means.

The COURT. Whether he was a boy scout.

Mr. CARUSO. Boy scout, all right.

Q. Were you a member of the Boy Scouts?

A. I was.

Q. Were you a member of any other organization?

A. I was. I belonged to the CYO, and I belonged to the Orange Valley Association, which was a pitching club. I belonged to the American Kennel Club of New York, with whom I had registered hounds. This was all while attending school. Prior to that I belonged to the laborers' union—excuse me—after I got out of school that was, and the Union Painters & Decorators.

Q. I asked you during your youth, which would be during your school years. Have you had, during your youth, any contact with the law?

A. At the age of 14, I and two other boys, we took a car and went for a joy ride, and this eventuated in my receiving one year probation, due to my outstanding home and civic record.

Q. Did you return to school?

The COURT. I did not hear that last answer.

The WITNESS. My outstanding home and civic record, participating in boy scouts and what have you.

12 Q. Did you return to school after this incident occurred?

A. I did. That is when I went to Orange Vocational School for a period of two years.

Q. After leaving the Orange Vocational School, did you go to work?

A. Yes; I did.

Q. What was the work?

A. Being that it was during the war years I worked for my father, due to the fact that help was hard to get, and as a painter and decorator. When my father was lax in work I joined the laborers' union group and because a laborer working on various projects and promoting myself as I went along, becoming a shop steward.

Mr. CARUSO. Speak louder, please, so we can hear every word.

The WITNESS. After that I became a union painter and I worked for various firms being a union painter.

Q. Mr. Cicenia, I would like you to recollect, if you can, the events that took place on Saturday, December 17, 1949, and I ask you if you will describe what happened on that day to the best of your recollection.

A. Well, December 17th, I and my older brother Thomas, we were hunting. Upon returning home I was told by my parents that the Orange Police left word for me to report

13 to the Orange Police Headquarters the following day.

Q. Was a time given for you to report?

A. At that time no specific time. The time was given when I immediately called Orange Police Headquarters and they told me to be there at 8 A. M., Sunday morning, December 18th.

Q. And at that time did you telephone the Orange Police Headquarters?

A. Well, it was approximately 5:30 in the evening of Saturday, December 17th.

Q. Then the following day when you were told to report what occurred?

A. Well, when I was told to report before, report to the Orange Police Headquarters at about 8 A. M. Sunday morning, my father in the presence of myself and my older brother, called Mr. Palmieri, my then counsel.

Q. And as a result of that telephone conversation what did you do?

A. The result of that telephone conversation—after speaking to Mr. Palmieri, my father told me——

Mr. CARUSO. Wait a minute. Let's get it straight. Do not tell us—I object to that, what somebody else told him. What did you do?

Q. The question was, Mr. Cicenia, as a result of that telephone conversation what did you do?

A. As a result of that telephone conversation I re-
14 ported to the Orange Police Headquarters.

Q. Did anyone report with you?

A. My father and my older brother Thomas.

Q. What time was that?

A. 8 A. M.

Q. What happened when you went to the Orange Police Headquarters?

A. I was immediately placed into custody by Sergeant Detective Deussingier.

Q. When you state that you were placed in custody, what do you mean; what actually happened?

A. I was separated from my father and my oldest brother and I was placed in a small room and I was told that two Newark detectives would be up to pick me up and take me to Newark.

Q. Who was present in the room where you were placed?

A. The two mentioned detectives, Sergeant-Detective Duessingier and I believe it was Lieutenant Johnson of the Orange Detective Squad.

Q. What occurred in that room while you were held there in custody?

A. While I was held in Orange I was asked questions pertaining to what if anything I had on my conscience, and I was also asked whom were my friends and who were not my friends, and what if anything I participated in in the past two years that was or might have been of an illegal nature.

15 Q. Did anything else occur while you were in the room in the Orange Police Headquarters?

A. No, nothing.

Q. What happened next on that Sunday morning?

A. Well, almost immediately, soon thereafter, two Newark detectives came up and they walked right into the room. I was identified as Vincent Cicenia and I was told I was to go with them.

Q. Do you know who the detectives were?

A. No; their names I do not know.

Q. Did you see your family before you left or anyone else?

A. No. I was taken out through the side entrance of the Orange Police Headquarters.

Q. Were you served with a warrant or complaint or any other legal process at that time?

A. Never at any time was I served with any of those.

Q. Neither before nor after the time the Newark Police picked you up?

A. No, never.

Q. Do you know whether there was a complaint issued in this matter?

A. No.

Q. Will you describe what happened when you arrived at the Newark Police Headquarters?

16 A. When I first arrived in Newark Police Headquarters, which was approximately 10 A. M., December 18th, I was fingerprinted; my picture was taken and I was immediately taken to the fourth floor of the Newark Police Headquarters.

Q. And where were you taken on the fourth floor?

A. I was taken into a large room, and at the time I did not know what room exactly it was. I believe it was the interrogation room at the time.

* * * * *

17 Q. Mr. Cicenia, will you describe the room to which you were taken in the Newark Police Headquarters?

The Court. It is understood that you have a continuing objection to the line of testimony designed to elicit how the confession was taken.

Mr. Caruso. Correct.

The Witness. The room I was taken to was a large

18 room and in it were several officers of the Newark Police

Department and the Newark Homicide Squad whom I later found out that that is the department they are from.

Q. Did you recognize or did you know who any of these officers were?

A. Yes; I do.

Q. And who were they to the best of your recollection?

A. Prosecutor—Detectives George Meagher, Assistant Prosecutor Maurice McKeown, Detective Kinney of the Homicide Squad and Detective Norris of the Homicide Squad, Detective George Gross. I believe he was from the Prosecutor's staff. There were several police officers but by name I would not be able to identify them.

Q. At about what time was this?

A. A few minutes after 10 o'clock in the morning.

Q. What happened while you were there?

A. The first thing, I was told to sit down and I was introduced to the several people of whom I have just mentioned. The very first thing that they did was throw a stack of pictures at me on the table and they asked me to identify any pictures that I could pick out for them.

These pictures were of various pictures, they were of a store, the outside, the inside, different street locations and I
19 was asked to identify any or all of these pictures. Not knowing what I was going to be questioned about and not being able to identify any of the pictures, I told them I didn't know what it was all about.

Q. Did you ask for an attorney during this period of time?

A. Right at that point I asked the Assistant Prosecutor, Maurice McKeown, if I could call my attorney, Mr. Frank Palmieri. He asked me who my attorney was and I told him Mr. Frank Palmieri. He told me—he says, "Well, as soon as we finish questioning you we will let you call your attorney."

Mr. CARUSO. I did not hear that last statement as to what Mr. McKeown said.

The WITNESS. He said as soon as we finish questioning you we will allow you to call your attorney. At that point I was taken out of the room and brought to a cell.

Q. How long had you been in the room?

A. At that time it was approximately a half hour, maybe three-quarters of an hour. I was taken to a cell. I didn't remain there too long. Maybe ten or fifteen minutes I remained there and I was taken back out again and I was again questioned.

I was asked whom I associated with and if I had anything to do with this particular crime. I denied it. I told him I did not know what they were talking about and I again demanded the right to see my counsel or at least call him, and that was refused.

I was then taken back to the cell. This was going on for—well, a period of several hours. After that as time was going on I was taken back and forth from this cell periodically all day long.

Q. Were you given any food during this period of time?

A. No; I was given nothing to eat at all day or that night. As I was being questioned by the various detectives there were several of them that were hitting me and they started beating me and they started telling me if I didn't agree to sign a statement that was being prepared by Detective George Meagher that I would never be able to go home again or see my parents or consult or be able to call or see my lawyer.

Q. Was this during the morning or during the afternoon of the interrogation?

A. This was in the late part of the evening, I would say anywheres from 6 to 8 o'clock.

* * * * *

Q. If you recall, who did this to you?

A. Well, there were these police officers whom I said, I couldn't be able to identify several of them. They slapped me around and hit me in my back, side, my rib section.

Mr. CARUSO. I would like to hear it. Will you please speak up.

The WITNESS. There were several officers whom I could not identify by name that participated in this beating. They were dressed in uniform and the homicide detectives that were present at various times but not in the presence of Mr. McKeown. They beated upon me but never on the face or around the neck or the back part of my head. It was always on the

lower part of my body. When this beating was not going on I was threatened with more abuse and I was threatened with the fact that they mentioned that I would never be able to go home again or see my lawyer.

Q. Did you ask to see your lawyer during this period?

A. Repeatedly I did.

Q. There is a contention—there is a reference to a confession or statement in various of the exhibits in this case. Did
25 you write a statement while you were in the custody of the Newark police?

A. I never did.

Q. Was a statement written in your presence?

A. It was being written by Detective George Meagher in his own words, in his own handwriting.

Q. When did Detective Meagher commence writing a statement?

A. I believe it was approximately 8 P. M.

Q. How long did his writing proceed?

A. Well, for almost an hour at least.

Q. And what happened when he finished writing the statement?

A. When he finished writing the statement I was told to affix my signature to it and I was also told that a disinterested witness would be coming into the room to witness my signature to this statement, and at that time that is when I told him I would not sign those statements under any circumstances, that I wanted to see my lawyer, but I did not realize and know exactly what they meant that they wanted me to sign a statement involving myself in a crime of which I did not commit.

Q. Were you permitted to see your lawyer before signing the statement?

A. No.

Q. Did you sign the statement?

26 A. Only under continued physical abuse and the fear that they kept putting into me I signed this statement, but it was against my will.

Q. When did you first see your attorney?

A. At approximately 9: 30 P. M. that same night after I signed the purported statement of confession.

Q. When were you arraigned in this matter?

A. The following day, December 19, 1949 at 11 A. M. before Magistrate Jacobs in the Second Precinct.

Q. Did you plead at that time?

A. My lawyer entered a plea of not guilty for me.

Q. I would like to direct your attention to the events which took place on March 26, 1951, when you entered a plea of non vult in the criminal matter in which you were a defendant. Immediately prior to that plea did you recall or know the contents of the statement which you signed in the Newark Police Station?

A. At no time did I know the contents of that statement that I signed in Newark Police Headquarters and at no time was any description of it given to me.

Q. Were you aware that your attorney had moved for inspection of the confession and for its suppression?

A. I was.

Q. And were you at that time aware that your attorney's motion had been denied by the County Court?

27 A. I was.

Q. Were you also aware that the denial by the County Court had been affirmed by the Appellate Division?

A. Yes; I was aware.

Q. And were you aware that the affirmance by the Appellate Division to the extent that it denied the right to inspect the statement and suppress it was affirmed by the New Jersey Supreme Court?

A. Yes.

Q. And did you know at that time that as a result of those rulings neither you or your attorney would see the statement or confession prior to your trial?

A. Yes; I was.

Q. I ask you whether or not the existence of this confession was the reason why you entered a plea of non vult on March 26th.

A. The fact that the confession was in existence induced that plea of non vult.

* * * * *

Cross-examination by Mr. CARUSO:

28 Q. Let us start from the beginning, Mr. Cicenia. I understand that you were advised by the Orange Police on the night of December 17, 1949, that you were wanted by the Orange Police. Is that right?

A. Well, they did not say I was wanted.

Q. You were told the night before the Sunday that you went to Orange about reporting?

A. I was requested to report to the Orange Police Headquarters the following morning.

Q. And the next morning which was Sunday, December 18th you voluntarily went to the Orange Police Headquarters?

A. I did.

Q. When you got in the Orange Police Headquarters weren't you advised by the Orange Police that you were wanted in Newark in connection with a murder?

A. At no time was I advised I was wanted in Newark for a murder.

Q. Wasn't there somebody in Orange that said to you that you were wanted down by the Newark Headquarters because of the murder of a man on Summer Avenue, in Newark?

A. No.

Q. Did you know at that time that Corvino and Demasi were down at the Newark Headquarters?

A. No.

Q. Did you know Mr. Armanda Corvino and John Demasi?

A. I did.

29 Q. They were friends of yours, weren't they?

A. Yes.

Q. They were pals of yours, weren't they?

A. To a certain extent; yes.

Mr. DEBEVOISE. I object to this characterization.

Mr. CARUSO. They were very good friends.

The COURT. It is all right.

Q. Very good friends in the same neighborhood, weren't you?

A. Not in the same neighborhood.

Q. You say this was 9 o'clock on the morning of Sunday, December 18th, that you went to the Orange Police Headquarters?

A. Yes.

Q. While you were there two Newark police detectives came up there to take you down to Newark?

A. Right.

Q. What time was that?

A. I could not tell you exactly.

Q. How long after you surrendered to the Orange Police?

A. I would say anywheres from twenty minutes to a half hour.

Q. You say you were not told at all that you were being taken to Newark in connection with a murder?

A. At no time was I told.

Q. Not told. Now, when you got to the Newark Police Headquarters, what is the first thing that they did with you?

30 A. They told me to empty all my pockets, which I did and they fingerprinted me and took my picture.

Q. There was no questioning then immediately, was there?

A. Not as soon as I entered the building; no.

Q. Were you placed in a cell?

A. Almost immediately? No; I was brought in, fingerprinted, picture taken and then I was placed in a cell.

Q. Did you know when you got to the Newark Police Headquarters why they wanted to see you?

A. No. I inquired but I was not told immediately why.

Q. How soon after you got to the Newark Headquarters did you first learn that you were wanted in connection with this killing?

A. When I was brought into the interrogation room and when the pictures were thrown at me I was asked if I was the person——

Q. Was that in the morning or in the afternoon?

The COURT. He did not finish.

The WITNESS. I was asked if I was the person that was involved in that particular crime.

Q. What did you say?

A. I said no, I had no part of it and I do not know nothing of it.

Q. Did you see Corvino and Demasi down there?

A. I did not.

31 Q. Did you ever see them down there? Were you confronted with these two men?

A. No; I was never confronted with them.

Q. At no time?

A. The following day at the arraignment; yes.

Q. But no time on Sunday afternoon?

A. No.

Q. Who is the first police officer who questioned you in connection with this crime?

A. Actually, it was not a police officer, it was an assistant, Assistant Maurice McKeown. He was the first to question me.

Q. He was the first?

A. Yes; the very first.

Q. Who was the second?

A. I wouldn't be able to give them to you exactly in order. I believe it was Detective Norris and Detective Kinney, Detective George Meagher and it just followed in rotation.

Q. Well, we have McKeown, we have Meagher, we have Kinney and we have Norris, right?

A. And Gross was there also.

Q. Who?

A. Gross.

Q. Very good. Now, that was what time? I am just trying to get the picture here. What time was it that this questioning began?

32 A. I believe the actual questioning began just a very little after 10 A. M. on that morning.

Q. A little after 10 A. M.?

A. Yes.

Q. How long did this questioning continue?

A. Well, no particular length of time. It was periodically at first. When I was first questioned it lasted maybe 15 or 20 minutes, a half hour, then I was taken to a cell. I remained there a few minutes and I was taken out again and requestioned and that was going on all day long.

Q. All day long?

A. Yes.

Q. On and off, isn't that right?

A. And during that questioning I continued to demand the right to call my lawyer and was refused.

Q. What time was it that Detective Meagher began to write down this so-called confession?

A. I would say——

Q. As near as you can remember.

A. I wouldn't be able to pinpoint it but anywheres from between 8 and 9 P. M. of that night.

Q. He started?

A. That is when he was writing the statement. When he started I did not see it, when he exactly started. But I seen
him writing it at that time, and when he finished it,
33 what he was writing, he showed it to me and told me
that I had to sign it.

Q. Then he showed it to you, is that right? You did not say anything to him at all about where you were born and where you went to school or anything of that sort, did you?

A. No; I didn't.

Q. You did not?

A. I did not.

Q. And you did not tell him anything about the details of the crime up to the time that he came to you with the statement, is that right?

A. I did n . I couldn't because I did not know nothing about it.

Q. Up to the time that the statement was shown to you did any police officers in uniform beat you as you stated in your direct?

A. They did.

Q. Do you know who they were?

A. I wouldn't be able to pick them out.

Q. Did you make it your business to find out who they were?

A. I couldn't.

Q. You could not?

A. I couldn't because I was locked up at all times.
34 How could I?

Q. Where did this beating take place?

A. Right in Newark Police Headquarters, in the interrogation room.

Q. In the interrogation room?

A. Right.

Q. Where this questioning was going on by Detective Meagher and Assistant Prosecutor McKeown, right?

A. Right—but I was never beat in the presence of Assistant Prosecutor McKeown.

Q. I see. The beating that was administered to you by uniformed policemen took place outside of the presence of these gentlemen?

A. Not these gentlemen, Mr. McKeown.

Q. Was it in the presence of Detective Meagher seated here at this table?

A. I said only in the presence of Mr. McKeown I was not beat. They took him out—rather, he left the room of his own free will, and all these officers were beating on me, not all at once but one at a time.

Q. Mr. Cicenia, I want to know exactly where and when this alleged beating by unkown police officers took place?

A. It took place in the interrogation room during Sunday, December 18th.

Q. What time?

35 A. The exact time I would not be able to tell you. It was all during the day, on and off.

Q. When you got down there at 10 o'clock how soon after you got there?

A. Oh, maybe an hour and a half.

Q. In the interrogation room?

A. In the interrogation room.

Q. I ask you, did this beating take place in the presence of Detective Meagher seated here at this table?

A. It did.

Q. It did?

A. It did.

Q. Did it take place in the presence of Lieutenant Kinney seated here? You know Lieutenant Kinney?

A. Yes; I know him.

Q. Did it?

A. It did.

Q. It was in his presence?

A. Yes; it was.

Q. Did it take place in the presence of Detective Norris?

A. It did.

Q. And was it in the presence of Assistant Prosecutor McKeown?

A. It was.

36 Q. To whom I point?

A. No; I am sorry, not in front of Assistant Prosecutor McKeown. He is the only one.

Q. But only in the presence of these other three gentlemen?

A. Detectives and the police officers.

Q. When I pointed out to you. Now, I ask you to look at this statement and ask you whether or not this is the statement that you signed. Take it.

A. How am I going to know if it is the statement I signed when I do not know what is in it.

Q. Is this your signature?

A. I was never shown.

Q. Is this your signature?

A. I was never shown the contents.

Q. Is that your signature?

A. It could be.

Q. What do you mean it could be?

A. It is my signature, all right.

Q. Is that your signature on each and every one of these seven pages? Look at it.

A. It is.

Q. Now, you signed your name on each and every one of seven pages, right?

A. That's right, and I was forced to sign my name on

37 every one of those seven pages.

Q. Who forced you?

A. Every detective that was questioning and beating me, that is who.

Q. I asked you specifically who. Mention names.

A. Well, the police officers I told you before and I am telling you again that I cannot name them because I don't know their names, but the detectives whom I mentioned I can mention.

Q. What detectives?

A. Detective Norris, Detectives Kinney and Gross.

Q. Detective Meagher?

A. Not Meagher. I said Detective Norris and Detectives Kinney and Gross. Meagher was there also.

Q. Meagher was present?

A. Yes.

Q. He was present when you were forced to sign?

A. That's right. He was the one that wrote that in his own words and in his own handwriting.

Q. Did you see him write it?

A. I saw him write it.

Q. It was in your presence when he wrote it?

A. Not at all times, no.

Q. Most of the time.

A. When I was in the room I seen him writing; yes.

38 Q. Would you mind looking this over and reading it to yourself, and then I want you—just read it.

A. For what purpose?

Q. Never mind for what purpose. You read it and then I want to ask you——

A. I was never shown the contents of this statement at no time. At no time was a description of it given to me.

The COURT. Just a moment. Do not argue with counsel.

Q. Read it.

The COURT. Mr. Debevoise will object if there is anything to object to.

Mr. DEBEVOISE. I think Mr. Cicenia might want to wish to consult with counsel during the course of his reading.

The COURT. Up to now all that Mr. Caruso has done is ask him that he read the statement. There is nothing objectionable about that.

Mr. CARUSO. It is in order to ask other questions which I expect to follow.

Q. Read it carefully, Mr. Cicenia.

The COURT. I see nothing objectionable about that.

(Witness reads statement.)

The WITNESS. I have read it.

Q. Is that the truth, Mr. Cicenia?

39 Mr. DEBEVOISE. I object, your Honor, the confession at this point has no materiality in this case. I mean, I am in a somewhat anomalous position of representing a person who has been trying to see this document for six or more years, but at this point I do not think that it has any bearing on this particular case. The question before the Court is what effect this document had on the treatment of this defendant which was accorded during the long period of time when the State of New Jersey refused to permit him or his counsel to see that confession.

At this point the only fact that is material is there was a confession, the manner in which it was obtained from him and the effect that that had upon his actions and the actions of the State.

Mr. CARUSO. On the other hand, this witness said this was all written by Detective Meagher. He didn't dictate it; he didn't furnish Detective Meagher with any of the information contained in this confession.

Now, when I asked the question, is it the truth, it goes to the credibility of this witness.

The COURT. I will sustain the objection to that question. That does not preclude you from asking him questions about the confession, but we are not here to determine the truth or the fact of the offense.

40 Q. You say that everything that is contained in these seven pages was written by Detective Meagher and you did not furnish him with any of the material that is in here?

A. That's right.

Q. Do I understand you correctly that there is not a single thing in these seven pages which you gave to Detective Meagher for him to put in this statement?

A. That's right.

Q. That is correct?

A. Yes.

Q. Even including where you were born and where you went to school and how many members there were to your family or in connection with your background, Mr. Meagher put that all down?

A. Yes.

Q. That is correct?

A. Yes.

Q. Was there any promise of reward given to you before you signed this statement by anybody?

A. No reward was promised, but I was promised that I could immediately call and see my attorney.

Q. Did you read this statement before you signed it?

A. Never.

Q. Was it read to you by Detective Meagher?

41 A. I can't recall that it was read to me, and if it was——

Q. You did not do anything about what was in here except for you to write your name seven times on each page, is that right?

A. That's right, because my signing that was the only way I would have been allowed to see my lawyer.

Q. Then you did see Mr. Palmieri, your lawyer, that same night?

A. Right..

Q. Only after I was forced to sign that statement.

Q. When you say you were forced, do I understand you to say that somebody forced you without you mentioning who it was that forced you?

A. Yes; I was forced.

Mr. DEBEVOISE. I object, your Honor. I think he is going into great detail what he means by forced.

Mr. CARUSO. He is insisting on the word "forced."

The WITNESS. Forced through fear and physical abuse.

The COURT. Just a moment. Calm yourself, we cannot all talk at once, the stenographer can only take one of us at a time. I think the last question is objectionable, Mr. Caruso. I wish you would reframe it.

Q. You saw Mr. Palmieri after this was signed by

42 you, didn't you?

A. That was the first time I saw Mr. Palmieri.

Q. Did you tell Mr. Palmieri anything about what happened to you that day down at Newark Police Headquarters?

A. I did.

Q. Did you tell him anything about being forced to sign this confession?

A. I did.

Q. Three days later did you accompany the detectives to show them where you had disposed of the gun?

Mr. DEBEVOISE. I object, your Honor.

Mr. CARUSO. It is a matter of credibility.

Mr. DEBEVOISE. That is wandering far from the true facts in this case, what he did subsequently as to the guns and what-not. That bears on the truth or the falsity of the charge with which he was accused in that case and I do not see that it is material in this application before the Court.

Mr. CARUSO. He says he knew nothing about this crime, and he signed this statement which contains all the details. I will not offer it in evidence at this time, but I would like to have it marked for identification.

The COURT. Yes; it may be marked.

(Confession marked Exhibit R–2 for identification.)

43 Mr. CARUSO. I am leading up to the important thing. I asked him the question that was objected to, whether or not he did not accompany the detectives to the Rockaway River on Route 6 on the 21st—that is three days after he was down in headquarters—and point out where he had disposed of the two guns.

Mr. DEBEVOISE. I object, your Honor.

The COURT. Just a moment. What is the basis for this? How does it bear on the issues here which we revolve around now, the involuntariness of the confession and the deprivation of counsel? I do not see how—it is not as though we were trying him for the offense.

Mr. CARUSO. I will eliminate all that by withdrawing the question. I am going to ask one question which will probably be objected to.

Q. Were you guilty or not guilty of participation in this crime?

Mr. DEBEVOISE. I object..

The COURT. Yes; I do not think that is the issue here. I will sustain that.

Mr. CARUSO. A reading of the cases will show that that is one of the material things, the question of innocence or guilt. I can point out cases where petitions for writs
44 of habeas corpus were thrown out because he did not allege that he was innocent of the crime.

The COURT. I know that there are those cases but I do not think that is the issue here. I think that the Federal Constitutional guarantees, Mr. Caruso, are designed to—unaptly, perhaps—but they are to protect guilty as well as the innocent.

Q. Now, you saw Mr. Palmieri that night, did you not?

A. I did.

Q. Was Mr. Palmieri present when you were arraigned the next morning at 11 o'clock in the Second Precinct?

A. He was.

Q. How often did you see Mr. Palmieri after that time, would you say?

A. Well, I was in the County Jail for sixteen months.

Q. You saw him a great many times?

A. I did.

Q. You saw him all during the time that he went into the courts to try to have an inspection made of your confession?

A. Confession and suppression I saw him many times during that time.

Q. Now, that took a period of say from 1949 until 1951, about two years almost before it went through the courts on the confession?

45 A. Sixteen months.

Q. Then the next thing you knew is that when you appeared before Judge Conlon on the pleas, right?

A. Yes.

Q. You were present there, weren't you?

A. I was.

Q. I ask you, weren't you present when your lawyer said this to Judge Conlon?

Mr. DEBEVOISE. I object, your Honor, the record as to all of this speaks for itself. We have all these proceedings stipu-

lated in evidence and I do not see any necessity to have the witness testify as to his recollection of what happened there.

The COURT. That will be so unless Mr. Caruso is laying the foundation for a question he wants to ask.

Q. You were there when Mr. Palmieri asked the Court to withdraw your plea of not guilty and enter a plea of non vult to the indictment?

A. I was present.

Mr. DEBEVOISE. Same objection, your Honor; this is all in the record.

The COURT. He says that is stipulated.

Mr. CARUSO. There is no question. I want to know as far as credibility is concerned——

Q. Did you say anything or do anything about that
46 confession—about what transpired in Police Headquarters at that time—did you bring it to the attention of the Court?

Mr. DEBEVOISE. I object. The record shows exactly what happened and there is no need to go into that.

The COURT. That is so, and it shows that he did not. The record indicates that.

Q. You were present when the sentences were imposed and Mr. Palmieri made a plea for you, weren't you?

A. I was present.

Mr. DEBEVOISE. My objection goes to this entire line of questioning. It seems to be utterly——

Mr. CARUSO. I do not know whether your Honor has read these things.

Mr. DEBEVOISE. I am confident that they will——

The COURT. Mr. Debevoise's objection is of leading him into the record when they are already stipulated so that there is no point in asking him. He has already admitted that whatever this record says occurred from the time the sentence occurred.

Q. You did not say anything either at the time you entered your plea of non vult or at the time that the sentence was imposed about what transpired in Police Headquarters, did you?

47 Mr. DEBEVOISE. I object for the same reason.

Mr. CARUSO. If your Honor please, I think——

The COURT. He has conceded that he did not—the record fails to show that he said anything, is that not so?

Mr. DEBEVOISE. That is correct.

Mr. CARUSO. That is all.

Mr. DEBEVOISE. I have no further questions.

ANGELO CICENIA, called as a witness in behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct examination by Mr. DEBEVOISE:

Q. Mr. Cicenia, where do you live?

A. 138 Summer Street, Orange.

Q. How long have you lived there?

A. Well, I am there about twelve years now.

Q. Is the petitioner in this case, Vincent, your son?

A. Yes.

Q. Will you describe what occurred on Saturday, December 17, 1949, when the Orange police visited your home?

A. Yes.

Q. Go ahead.

A. I was going in the driveway and a car come in—another car come in. I turned around——

48 Q. What time was that?

A. It was around 5 o'clock, after 5 o'clock, we will say. So I know that is Detective Frank, was his name. I say, "Hello, Frank."

I say, "What happened?"

He says, "Nothing, we are just coming in to see you. Why, don't you like our company?"

I says, "Sure, why not."

Then he asked me—he says, "I want to see one of your sons."

I say "Well, who do you want to see, I got five sons. Who do you want to see?"

He says, "Vincent."

I says, "He is with his brother hunting today. He is not here right now, but as soon as they are coming home, I will send him down to the City Hall."

He says, "No, it is not so interesting or important to send him tonight. It could be tomorrow or the day after, any time."

Well, I said, "It is up to you. I will have him come down there tomorrow morning."

Then the other detective says, "Yes, I will be there. You could have him come there about 9 o'clock to the City Hall."

49 We called—it was half past 6, we called Vinnie and he got up and we had coffee.

Q. You are getting a little ahead of the story. Get back to Saturday. Did your son Vincent return home that afternoon?

A. In the night; yes.

Q. What time?

A. After 7 o'clock.

Q. Did he telephone the police at that time?

A. Well, at that time, no. We were told that it was not so important. I believe they did call. Frank wasn't there, Frank, I don't know what his name——

Q. The following morning did you telephone Mr. Palmieri?

A. Yes.

Q. After you telephoned Mr. Palmieri what did you do?

A. We called Mr. Palmieri in the morning.

Q. After you phoned him——

A. And we told him what had happened.

The COURT. After you telephoned, what did you do after you telephoned Mr. Palmieri?

The WITNESS. What did I do? See, we called Mr. Palmieri and we told who the detective was over at our house on a Saturday.

The COURT. After you hung up the receiver what did you do?

The WITNESS. We went to the City Hall.

50 Q. Who was with you when you went to the City Hall?

A. What is that?

Q. Who was with you when you went to the City Hall?

A. It was my old son and Vinnie.

Q. What happened there?

A. Happened there? We got in the room, and I know them all over there—good morning, good morning—and then he

says—he told us to step out because they say, "We got to question Vinnie."

Well, I says, "Go ahead and question him."

He says, "No; you got to step out."

We stepped out and they questioned him. That is the last that I seen him. They took him down to the Newark after that.

Q. Did you attempt to obtain an attorney after they took him to Newark?

A. Sure.

Q. Who was that attorney?

A. Frank Palmieri.

Q. Did you attempt to see your son Vincent after you obtained Mr. Palmieri?

A. Sure, we went to see him. We say we want to see—we want to talk to him.

Q. Did you go to Newark with Mr. Palmieri?

A. Yes.

51 Q. What time was that?

A. I think it was around 2 o'clock.

Q. That you arrived in Newark?

A. Yes; we went down to Newark.

Q. Did Mr. Palmieri attempt to see your son at about that time?

A. Well, we went upstairs and he asked—I don't know who was there, the captain or something—he asked him—he says, "I am a friend of—I represent Vincent Cicenia and I am asking you to see him and I am trying to see him."

He was refused. They said, "You cannot see him."

Q. Did Mr. Palmieri in your presence attempt to see him subsequently during the course of the afternoon?

A. That's right, all the time he tried and tried.

Q. And he was not permitted to see him?

A. He was refused to see him.

Cross-examination by Mr. CARUSO:

Q. What time did Mr. Palmieri see your son Vincent?

A. It was about a quarter after 9 or half past, something like that.

Q. Were you there?

A. No.

52 THOMAS CICENIA, called as a witness in behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct examination by Mr. DEBEVOISE:

Q. Mr. Cicenia, where do you live?

A. 313A Carroll Street, Orange.

Q. Did you live there in the year 1949?

A. Yes, sir.

Q. What relation are you to the petitioner in this case?

A. I am his brother.

Q. Will you describe what you and your brother did?

The COURT. Keep your voice up.

Q. Will you tell us what you and your brother did on Saturday, December 17, 1949?

A. Well, we always went hunting together and we came back from hunting. I don't know the exact time, but my father was in the driveway and he came over to us and he asked my brother—he said to my brother, "Vinnie, two detectives were up here."

Q. I think we have had testimony on that. Did your brother telephone the police that evening?

A. Yes; he did.

Q. Did you see or hear your father telephone Mr. Palmieri, the following morning?

A. Yes.

53 Q. And you were with your father and brother and mother when they went to the police station the following morning?

A. Yes.

Q. And were you with your father and Mr. Palmieri when they went to the Newark Police Headquarters on Sunday, the 18th?

A. Yes.

Q. Will you describe what happened at the Newark Police Headquarters?

A. Well, when we got there the first thing Mr. Palmieri did

was walk into a small office to the right when we went upstairs, and he asked the officer that was sitting at the desk there if he could see Vincent Cicenia, my brother.

He says, "I am sorry, you can't see him."

So every five or ten minutes he kept going in there and they refused to let him see him. A lot of words were being said between them and he was arguing with them and finally he asked Mr. McKeown there if he could see Vincent Cicenia, and he says, "We are still working on him."

Q. What time was that, do you recall?

A. Mr. Norris there, I remember him talking to Mr. Palmieri something to the effect—"Take it easy, you will get to see him pretty soon, we are still working on him."

Q. Do you recall what time each of these conversa-
54 tions took place?

A. During the course of the day. I don't remember times.

Q. Did you ultimately see your brother?

A. I asked Prosecutor McKeown who was coming down the stairs, and I asked him if he would please let me go up and see my brother.

Q. What time was that?

A. This was after Mr. Palmieri had seen him, 9 or 10 o'clock at night, I don't know.

Q. Did you see your brother at that time?

A. Yes. He says, "You can go up and see him for a few minutes."

Q. Will you describe what you saw when you saw your brother, his condition or appearance?

A. I tried talking to him and he just could not answer me. He seemed like he was all mopey, I don't know.

The COURT. All what?

The WITNESS. He did not seem right when I was trying to talk to him. He couldn't answer me.

Mr. DEBEVOISE. No further questions.

Cross-examination by Mr. CARUSO:

Q. Mr. Cicenia, did you know when you accompanied Mr. Palmieri to Newark Police Headquarters that your brother was

being held in Newark Headquarters in connection with
55 a stickup murder?

A. No, sir.

Q. You did not know?

A. No.

Q. Why did you get Mr. Palmieri?

A. One of the detectives in Orange Police Headquarters——

Q. Why?

A. That is what I am going to tell you.

The COURT. He is telling you.

The WITNESS. One of the detectives in Orange Police Headquarters said—we asked him, my father and I, what was my brother being held for.

He says, "All I can tell you is to get a good lawyer."

We knew nothing about law or anything, and we got Frank Palmieri. He is only a real estate lawyer, now we understand it.

The COURT. I do not think we are going to try Mr. Palmieri's qualifications.

Mr. DEBEVOISE. I ask that it be striken.

The COURT. Strike that out.

Q. When you got down to Newark Police Headquarters with Mr. Palmieri, did you then learn that your brother was under investigation in connection with this murder of a man on Summer Avenue?

56 A. Yes.

Q. You did know that?

A. Yes.

Q. How long after you arrived at Newark Headquarters did you learn that?

A. When he started asking the officer behind the desk what was his client being held for, he said, "We are working on him."

They wouldn't tell him, they wouldn't give him no answers or nothing.

Q. Did you know it was a murder case?

A. No; I did not know that it was a murder case. I never thought my brother would be involved in anything like that.

Mr. CARUSO. I move to strike that out.

The COURT. Yes.

Q. What time did you see your brother with Mr. Palmieri, the exact time on Sunday night, December 18, 1949?

A. I didn't see my brother with Mr. Palmieri. I know Mr. Palmieri was allowed to go upstairs and see my brother about 9 or 9:30.

Q. You didn't go up with him?

A. No, sir.

Q. So you don't know how your brother looked or anything of the sort?

Mr. DEBEVOISE. I object. He has testified——

57 Mr. CARUSO. He said something about seeing him and he said that a little while ago on direct.

The WITNESS. After Mr. Palmieri saw——

The COURT. Let us have the question.

Q. Did you see your brother in the company of Mr. Palmieri?

A. No.

Q. Did you see your brother alone without Mr. Palmieri? That night I am talking about.

A. Yes.

Q. Did you know then that he was being held in connection with a murder case?

A. Mr. Palmieri had told me.

Q. You knew about this?

A. That is right.

The COURT. What time did you arrive at the Newark Police Station with Mr. Palmieri that day?

The WITNESS. I don't remember the exact time, sir.

The COURT. Morning, afternoon——

The WITNESS. In the afternoon, maybe 1 or 2 o'clock, something like that.

The COURT. And you stayed there continuously until after 9 o'clock?

The WITNESS. Yes.

The COURT. You did not leave the place?

The WITNESS. No, sir.

58 The COURT. Did you go and get something to eat?

The WITNESS. No; I stayed right by the office there with Mr. Palmieri.

59 AFTERNOON SESSION

JOSEPH A. KINNEY, called as a witness in behalf of the Respondent, having been first duly sworn, testified as follows:

Direct examination by Mr. CARUSO:

Q. Lieutenant, what is your official position in the Newark Police Department?

A. Lieutenant of Police, assigned to the Detective Division, Homicide Squad.

Q. How long have you been such——

A. How long have I been a Lieutenant?

Q. In the Homicide Squad?

A. Lieutenant, three years.

Q. And before that?

A. A sergeant also in the Homicide Squad.

Q. How long altogether were you associated with the Homicide Squad?

A. Eleven years.

Q. You are familiar with the crime that took place in Newark on the 17th of March, 1947, in which a man was killed on Summer Avenue?

A. Yes.

Q. Did you undertake the investigation of that crime?

A. Yes.

60 Q. When did anything develop after the crime with respect to any charge?

Mr. DEBEVOISE. I object, your Honor. That is very vague.

The COURT. It is very broad.

Mr. CARUSO. Let me make it more direct.

Q. On or about December 17, 1949, was anybody arrested in connection with that crime?

A. Yes, sir.

Q. Who was it?

A. Armanda Corvino.

Q. Where was he taken?

A. He was picked up in Orange and taken to the Newark Police Headquarters.

Q. As a result, did you question Corvino?

A. Yes.

Q. When did Cicenia appear in the Newark Police Headquarters?

A. The following day, December 18, 1949.

Q. That was a Sunday?

A. Yes.

Q. And how did that come about?

A. Result of information relayed to the Orange Police and at our request they picked him up.

Q. When did Cicenia arrive at Newark Police Head-
61 quarters if you know?

A. I don't know the exact time. I only know the time I saw him first.

Q. When were you in police headquarters on that day?

A. That particular day I arrived there at about 11:30 or 11:45.

Q. Was Cicenia there then?

A. Yes, sir.

Q. Will you tell the Court what happened with reference to Cicenia and what did you do with respect to the investigation?

A. At the time I arrived at Police Headquarters, Cicenia had not been through the processing stage. In other words, they hadn't completed the printing and picturing and making out the necesary forms. After he was finished he was turned over to the Homicide Detective Norris and myself. At that time we were on the fourth floor in Police Headquarters.

Shortly after this another defendant in the same case was brought down to us by our detectives from Orange.

Q. Do you remember his name?

A. Yes, sir; John Demasi.

Q. Now, proceed with respect to Cicenia. We are interested in when the questioning of Cicenia began.

A. About 12:15 or 12:30 P. M.

62 Q. Were you there during this questioning?

A. Yes, sir.

Q. Who undertook the questioning of Cicenia in the beginning?

A. Myself.

Q. Anybody else?

A. Detective Norris.

Q. When did Detective Meagher of the Essex County Prosecutor's office come on the scene?

A. About 12:45 or 1 o'clock, maybe 1:15.

Q. From then on can you give us all the details with respect to Cicenia, what was done and also in connection with these other defendants?

A. We questioned Cicenia briefly and for about 20 or 25 minutes, and he told us or repeated to us orally what he already had told the Orange Police. Then we put him in a cell and started talking to the defendant Demasi and spoke to him for probably an hour or an hour and a half, then put him back in the cell. I would say we started talking to Demasi some time around 1:30 or thereabouts. Then we started—we took a break and we started talking to Cicenia again about 3:15 or 3:30 and spoke to him for forty-five minutes to an hour.

At that time Cicenia changed his story after he was confronted by Demasi.

63 Q. Was Cicenia turned over to anyone for the purpose of taking his written statement?

A. Yes.

Q. Who was it?

A. Detective Meagher of the Prosecutor's office.

Q. Were you present?

A. No; not when the written statement was taken.

Q. Do you know when Detective Meagher began to take his written statement?

A. Approximately around 5:15, between 5:15 and 5:30 P. M.

Q. Lieut. Kinney, at any time that day—I am referring to the testimony of Mr. Cicenia in which he said he was given no food—do you know of your own knowledge whether or not he was fed?

A. Yes, sir; he was fed.

Q. Approximately what time would you say?

A. I would say around 1 o'clock.

Q. Were you present during the taking of his written statement by Detective Meagher?

A. No, sir; I was not.

Q. At any time?
A. No.
Q. When it was completed?
A. No, sir.
Q. Let me ask you, do you know of anybody who ever
64 told Cicenia to sign or he would not go home?
A. No. sir.
Q. Do you know of your own knowledge whether anybody had ever said that to him?
A. No conversation like that took place prior to the taking of the written statement.
Q. Do you know of any officers in uniform who beat him? Was there any such incident?
A. There was no uniformed officers present in headquarters that day.
Q. Of your own knowledge?
A. No, sir; there was no uniformed men there at all.
Q. Did anyone subject Cicenia to any abuse that you know of?
A. No, sir.
Q. Or any threats or any physical violence?
A. No.
Q. What time was the statement of Mr. Cicenia completed, if you know?
A. I would not know because I was taking another statement at the time.
Q. Whose statement were you taking?
A. John Demasi.
Q. Who was taking Corvino's statement?
A. That was taken subsequently about 9:30 by Detec-
65 tive Norris. The statement of Demasi and Cicenia were started within five or ten minutes of each other.
Q. Were you present when a disinterested witness by the name of Taylor arrived at headquarters?
A. Yes, sir.
Q. Were you present when Mr. Taylor questioned Mr. Cicenia with respect to his statement?
A. Yes, sir.

Q. Can you tell us what Mr. Taylor asked Cicenia with respect to that statement as far as you can recollect?

A. In substance some of the things he asked him—if that was his statement, if he had given it of his own free will.

Q. What did Cicenia say in answer to these questions?

A. Answered it in the affirmative. He asked him how he was treated by the police and he said—I don't remember his exact words, but good or very good or words to that effect. He asked him if any threats were used on him at any time and he said no, and I think the interrogation by the impartial witness only took about five minutes.

Q. When was all of this completed? I mean, when everything ended and that three men's statements were in, about what time was that?

A. Well, the first two statements that were started around 5:15 or 5:20, they were completed somewhere in the neighborhood of 9 o'clock. Corvino's statement was started about 9:30 and his statement was probably completed about 12:30 and at about 12:30 the three statements were completed, but Cicenia and Demasi were in their cell after their statements were finished and after the entire interrogation by the impartial witness, and Cicenia and Demasi both saw Mr. Palmieri who, as I recollect, was representing both of them at that time.

66

Q. Did you see Mr. Palmieri?

A. I was present when he questioned both of them or talked with them or interviewed them.

Q. Talked to his clients?

A. Yes; in my presence.

Q. That was about what time?

A. Around 9, after the statements were finished.

Q. Were you present at the arraignment?

A. Yes, sir.

Q. When did that take place?

A. The following morning about 10:30 before Magistrate's Court, Second Magistrate's Court in the City of Newark. It was Magistrate Jacobs.

Q. And Mr. Cicenia was present at that time?

A. Yes.

Q. Represented——
A. By counsel.
Q. With Mr. Palmieri present?
67 A. Yes.
Q. To represent Cicenia at the arraignment?
A. Yes.
Q. Was there a plea of not guilty entered for Cicenia?
A. Yes, sir.
Q. Was Cicenia advised by the Court with respect to his rights?
A. Yes.

* * * * *

Cross-examination by Mr. DEBEVOISE:

Q. Lieut. Kinney, did you see Mr. Palmieri when you arrived at the Newark Police Headquarters on December 18th?
A. No, sir; I did not.
Q. Did you know he was there?
A. Not until I saw him about 9 o'clock, 9:15.
Q. You did not know that he had been asking to see Mr. Cicenia all through the afternoon and evening?
A. No; I did not.
68 Q. You stated you were in attendance at the arraignment the following day?
A. Yes.
Q. Had a warrant to your knowledge been served upon or issued for the arrest of Mr. Cicenia prior to the arraignment?
A. No, sir.
Q. Or a complaint?
A. A complaint was made on Monday morning prior to arraignment.
Q. Therefore you did not promptly arraign Mr. Cicenia when you arrested him on Sunday?
A. No.
Q. With respect to Mr. Taylor, the disinterested witness, where did he come from?
A. We have a list of impartial witnesses that we call upon, and he was there at our request and request of the prosecutor's office.

Q. He is on your list?

A. Yes.

Q. Have you called upon him in other matters to be an impartial witness?

A. Let me correct myself. I don't know whether he is on our list, but he has been used before and he was called upon that day. Sunday is a pretty rough day to find anyone
69 home.

Q. Did you—or do you know of anyone who told Mr. Taylor what questions to ask Mr. Cicenia?

A. I believe he either knew of his own knowledge in general what he was to ask. I did not tell him anything to ask.

Q. During the question of Mr. Cicenia, did anyone—did you or anyone in your presence tell him that if he did not answer Mr. Taylor properly the questioning would resume?

A. No, sir.

Q. Is that your practice to advise suspects who are under interrogation that unless they answer as you specify questioning will resume after they get——

A. No, sir.

Mr. CARUSO. That is custom? I object to that. I would like to know what happened in this particular case.

The COURT. Only what happened here would be admissible.

Q. You stated that neither you nor yourself nor anyone in your presence used force or violence against the person of Mr. Cicenia?

A. That is right.

Q. How many persons for the Prosecutor's office or the Police Department were present during the various questioning periods of Mr. Cicenia?

70 A. Well, from the Newark Police Department there was Detective Norris and myself, both of whom are attached to the Homicide Squad. From the Prosecutor's office in the beginning was Detective Meagher; subsequently Detective Gross, Harvey Gross was called in. Then later after Detective Meagher arrived the Assistant Prosecutor, Maurice McKeown came down.

Q. That made about six people?

A. Five I count.

Q. Five people who were present during most of this questioning?

A. On and off.

Q. And nobody used any violence—and by violence, did anyone touch Mr. Cicenia?

A. No.

Q. Did anyone blow smoke in his face?

A. No.

Q. Was smoking going on in the room during this questioning?

A. I could not tell you that, I don't remember. I don't smoke, so whether they were smoking I don't remember.

Redirect examination by Mr. CARUSO:

Q. You say there were five persons altogether, law
71 enforcement officers who were engaged in questioning, is that right?

A. Yes.

Q. But there were three defendants who were being questioned, weren't there?

A. Yes.

Q. Were they being questioned at the same time in one room or were they questioned by a portion of these five people at different times and in different places?

A. At one time there we had the three of them spread out at different parts of our room. In our homicide room we have a divided—it is divided into two sections, the workroom where the desks are and a back room which we use for interrogation. Across the hall from the homicide room is an extra room which at that time was our traffic tabulation room, and now is our narcotics room. We made use of that room on that day, and which is customary when we have more than one defendant to talk to.

Q. So that all five of these people were not engaged in questioning Cicenia, were they?

A. No, sir. I said on and off there were five men in the room, in the big room or in the small room.

Q. Some of these were engaged in questioning Corvino and others were engaged in questioning Demasi?

A. Yes, sir.

Q. For example, in your case you were questioning
72 Demasi?

A. Yes, mostly.

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GEORGE E. MEAGHER, called as a witness in behalf of the Respondent, having been first duly sworn, testified as follows:

Direct examination by Mr. CARUSO:

Q. How long have you been connected with the Essex County Prosecutor's staff?

A. Twenty-seven and a half years.

Q. Always engaged in homicide?

73 A. Over twenty-six years.

Q. Do you recall this crime committed on March 17, 1947?

A. I do; yes.

Q. Do you recall the arrest of Mr. Cicenia and the other two men, Corvino and Demasi?

A. I do.

Q. Will you tell Judge Forman when you got to Police Headquarters in connection with this investigation?

A. I arrived at Newark Police Headquarters as a result of a telephone call from Lieut. Kinney about 12:45 P. M., Sunday, December 19, 1949. I immediately went to the fourth floor of the Homicide Bureau, and we first interrogated Demasi. That was about 1:35 until in the neighborhood of 2:20.

We then had a bite to eat and returned to headquarters and talked to Cicenia—started to talk to Cicenia about 3:15 P. M.

Q. Was that when you began questioning Cicenia?

A. 3:20 to be exact.

Q. How long did that questioning of Cicenia continue?

A. Until about 4:10.

Q. This was oral, of course?

A. That is correct.

Q. During that time did he tell you his connection with this crime?

74 A. He did.

• • • • •

75 Q. You tell us what Cicenia's story was to you?

The WITNESS. He stated that on March 17, 1947, he was riding in a car with the other two defendants, Corvino and Demasi and that they were riding around the northern part of Newark in Belleville, and then they came back from Belleville into Newark. They saw a grocery store and a dry goods store. Corvino told Demasi to stop the car opposite the dry goods store and he gave Cicenia $3 to go into the grocery store and—no, to go into the grocery store and see what the grocery store looked like, to case the grocery store.

He went into the grocery store and then returned to the car after purchasing a pack of Camel cigarettes.

76 He told Corvino that there were too many people and children in the back of the store and he thought there would be trouble. He then—Corvino then sent him into the—told him to go into the dry goods store. He went into the dry goods store and asked the man to look at some shirts, sport shirts. The man showed him shirts and he told the man he did not like them.

He left the store and returned to the car and told Corvino that it wasn't a good place to take, or words to that effect.

He then states—stated that Demasi and Corvino got out of the car, at Corvino's request, and went into the dry goods store and he remained in the car.

However, when we told him what Demasi had told us a short time previously he then stated that after he returned from the grocery store he went into the dry goods store and looked at the shirts, was not satisfied with them and he returned to the car which in the meantime had been driven just off the corner of Summer Avenue, just around the corner, the southern corner and that then he and Corvino—Corvino gave him a .32 Beretta automatic and the three of them got out of the car, crossed the street. Demasi remained on the corner as a lookout.

77 They—Corvino and Cicenia—went to the dry goods store. Cicenia went in first followed by Corvino. He asked the man to be shown some of the shirts they had been shown previously. The man attempted to—or went to get

some boxes of shirts. Corvino pulled out his gun and said, "This is a stick-up."

The man says, "You are joking."

Cicenia went back around the counter and as the proprietor came toward him and slapped him in the face, slapped Cicenia in the face, Cicenia then pulled out his gun and when the proprietor came toward him again he fired a shot which he thought hit him in the stomach.

He then—the proprietor—ran from behind the counter toward the front door and he and Corvino were in a tussle. Cicenia jumped on the counter and shot—fired another shot at the proprietor who at that time had his back toward him. Corvino then shouted—"Grab the money and get out of here."

He reached over and took some money out of the cigar box.

Q. Who took the money?

A. Cicenia.

Q. How much did he take?

A. $6.25; a five-dollar bill, a dollar bill and a 25-cent piece.

78 Q. What happened after that?

A. He then ran out of the store. The door was open. Corvino had in the meantime fled and they went to meet Demasi on the corner. They got in the car and they drove a few blocks without turning on the lights and then they returned to a place called Gambers in Orange, a luncheonette where they used to meet.

Q. Detective, did he tell you what happened to the guns?

A. He did.

Q. The two guns which he said were furnished by Corvino?

A. Well, the Beretta—he gave the Beretta back to Corvino after he got into the car. Then the following day, early evening, he met Corvino—Cicenia met Corvino and he had his father's truck with him and they drove out to Route 6 past Bloomfield Avenue. They passed the river and they turned around and came back to the river and they stopped, got out of the car and dismantled the automatic and threw it into the river.

• • • • •

79 Q. Detective, as a result of this oral admission which he gave you and which you just repeated, what did you do, did you reduce it to writing?

A. Yes.

Q. Is this the statement that was reduced to writing?

A. It is, yes.

Q. Is that in your handwriting?

A. It is.

80 Q. Were there any threats or violence shown Cicenia before this was taken?

A. No.

Q. Were any promises of reward made to Cicenia before the taking of this statement?

A. No, sir.

Q. Did he sign this statement?

A. He did, each and every page, seven-page statement.

Q. Did you read it to him before he signed it?

A. I read it to him; yes.

Q. Did he read it after you read it to him?

A. He read it aloud.

Q. How long did it take to complete this statement Mr. Meagher?

A. I started at 5:17 P. M. on that Sunday, and I finished writing about 8:10 or thereabouts. We waited about fifteen or twenty minutes for an impartial witness to arrive, Mr. Taylor. He arrived in the neighborhood of 8:30.

Q. Before you get to that—Mr. Cicenia said that you wrote this in your own words. Where did you get the material to write this statement?

A. I questioned Mr. Cicenia and the answers I put down in this form.

Q. Mr. Cicenia said that during that afternoon—I have to think of these dates—December 18th.

81 The COURT. Sunday.

Q. He was given no food in headquarters. Is that so within your knowledge?

A. I could not say. I could not definitely say. I believe we brought him food back when we ate.

Q. You do not have a definite recollection?

A. I think it was sent into the cell block. I could not definitely state.

Q. You undertook the taking of the statement, did you not?

A. Yes, sir.

Q. And did anyone in your presence—or did you say to him you had better sign or you won't go home, or something to that effect?

A. No, sir.

Q. Do you know anything of any officers in uniform who beat him?

A. No.

Q. He said that this took place in your presence, is that so?

A. I didn't see any uniform officers on the fourth floor all the time I was there.

Q. On Sunday?

A. On that particular Sunday.

82 Cross-examination by Mr. DEBEVOISE:

Q. Detective Meagher, you stated that you began questioning Mr. Cicenia at 3:15, if I am correct?

A. 3:20 P. M.

Q. Is it not true that Lieut. Kinney had been questioning him prior to that time?

A. Not to my knowledge. He could have been.

Q. Does your recollection of Lieut. Kinney's testimony differ from mine to the effect that questioning began at 12:15 or 12:30?

A. I did not arrive there until about 12:35.

Q. And Cicenia had not been questioned to your knowledge?

A. I couldn't say. I wasn't there.

Q. You just don't know?

A. I don't know.

The COURT. When you arrived at 12:45, I understand counsel is asking about.

The WITNESS. He was not being interrogated then.

Q. Do you know whether or not he was questioned between 12:45 and 3:15?

A. He wasn't questioned in my presence.

Q. Was he questioned at all or don't you know?

A. I would say no.

Q. You said you wouldn't say so?

A. I would say no.

83 Q. But you don't know for a fact?

A. No.

Q. Mr. Cicenia was turned over to you at 5:15 for the taking of a statement, is that correct?

A. Started the statement about 5:17.

Q. And he had been in the Newark police headquarters since approximately 10 o'clock in the morning?

A. That is correct.

Q. During the time he was in the Newark police headquarters did you hear him ask for counsel?

A. No, sir.

Q. He never asked in your presence to consult with his counsel?

A. Not in my presence.

Q. Did you know that Mr. Palmieri was waiting on the third floor and asking to see Mr. Cicenia?

A. No, sir.

Q. You don't know that at 2 o'clock Mr. Palmieri arrived and asked Lieut. Cohen for permission to consult with his client, Mr. Cicenia?

A. No.

Q. And you were not aware that Lieut. Cohen telephoned upstairs to Prosecutor McKeown to inform him that a Mr. Palmieri was there?

A. No.

84 Q. And you didn't know that Lieut. Norris went downstairs to the third floor and spoke with Mr. Palmieri?

A. I didn't know; no, sir.

Q. And Mr. Norris didn't mention that to you or to anyone else in that room to your knowledge?

A. No.

Q. And you didn't know that Mr. McKeown spoke to Mr. Palmieri at about four or four-forty in the afternoon?

A. No, I did not.

Q. And you didn't know that every half hour from about 4:40 on, Mr. Palmieri was requesting leave to see Mr. Cicenia?

A. I didn't know that.

Q. Did you or did anyone in your presence hand Mr. Cicenia a purported confession or statement of Corvino or Demasi?

A. No.

Q. Did you tell him that Corvino or Demasi had made statements?

A. No, they had not made them at that time.

Q. Did you say you were questioning Corvino and Demasi?

A. No. I told him—we told him—I don't know whether I did specifically, but he was told that Demasi had been questioned and had made an oral admission.

Q. He was told that?

A. That's correct.

85 Q. Was he told that prior to his making the statement to you?

A. Yes.

Q. And was the statement which you reported to Mr. Cicenia concerning Demasi's statement correct in every respect, or did you give him a false statement of what Demasi had said?

A. It was Demasi's statement which we did not know at that time whether it was correct or not.

Q. But you told him nothing more than what Demasi told you?

A. Because I had not talked to the other defendants at the time.

Q. You told him nothing more than what Demasi had told you?

A. That's correct.

Q. And nothing less of what Demasi had told you?

A. That's right.

Q. Do you know whether or not Mr. Taylor was on your list of disinterested witnesses?

A. I am not positive whether he was on. We had an original list of fifty names of citizens and I am not sure whether he was on that list or not.

Q. Do they receive compensation for serving as disinterested witnesses?

86 A. They are members of different civic organizations who volunteer at different meetings. That system was started by Mr. Justice Wachenfeld in 1942 when he was prosecutor.

Q. Did you or someone in your presence instruct Mr. Taylor what he was to ask Mr. Cicenia?

A. I believe at that time a set of questions was given to him.

* * * * *

Redirect examination by Mr. CARUSO:

Q. And you were present when Mr. Taylor questioned Mr. Cicenia?

A. I was.

Q. This was after Mr. Cicenia had completed and signed his statement and after he had read it out loud, after you had read it out to him before he read it, is that so?

A. That is correct.

Q. How long was Mr. Taylor there?

A. Mr. Taylor was there from about 8: 30 P. M. on December 18, 1949, until after 1 A. M. December 19th—about 1: 15 A. M., December.

* * * * *

88 MAURICE MCKEOWN, called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct examination by Mr. CARUSO:

Q. You are Assistant Prosecutor of Essex County?

A. Yes.

Q. And have been such since when?

A. Almost ten years, May 1, 1946.

Q. Were you present in the Newark Police Headquarters on the afternoon of December 18, 1949?

A. I was called some time around 2 o'clock, between 2 and 2:15. I got there approximately a little before 3 o'clock. I met the officers at lunch.

Q. Can you explain to Judge Forman just why an Assistant Prosecutor was there, like you for example—what was the custom?

A. At that time, if the Court please, Mr. Minard was the Prosecutor of Essex County. Mr. Congleton was the first assistant prosecutor and generally in charge of all homicide cases, and a general rule was made where a homicide case was of a felony nature which might possibly involve the death penalty, that an assistant prosecutor would be present during a portion of at least the investigation.

Q. When you got to headquarters, Mr. McKeown, was Cicenia there?

89 A. When I got to headquarters he apparently was there in headquarters but at the moment he was not in the investigation room which was on the fourth floor.

Q. He might have been in the cell block?

A. Yes, sir.

Q. Were the other two men there?

A. They were probably in the cell block, too.

Q. What did you do?

A. I did practically nothing, as a matter of fact, because the investigation was completely in charge of Lieut. Kinney, who I believe at that time was Sergeant Kinney, and Detective Meagher from the Prosecutor's Homicide Squad.

Q. Were you present during the questioning of Cicenia by Detective Meagher?

A. Part of the time.

Q. You were in and out?

A. That is right.

Q. Were these other men being questioned at the same time in another room? What was the conversation?

A. I saw Demasi there during a portion of the time. I don't know whether Cicenia was being questioned at the same time or not. I know that Lieut. Kinney was questioning Demasi. I also saw Mr. Corvino there. I did not participate in the questioning of anybody.

Q. Were you supervising it?

90 A. No, that is secretly within the purview of Lieut. Kinney.

Q. Did you see the attorney, Mr. Palmieri?

A. I did.

Q. Could you tell us about when you first saw him on that afternoon?

A. I may have seen him, Mr. Caruso, so I am not sure when I first came into headquarters. I had no conversation with him at that time. Some time after I arrived at headquarters and while I believe Detective Meagher was questioning Cicenia orally.

Q. Did you talk to Mr. Palmieri?

A. I did.

Q. Something has been said about him requesting you to see his client. At that time did you say to him—use any words as have been testified to, "We are not through working on him." Did you use the words "working on him"?

A. Definitely not. I said the officers are making an investigation of a homicide case and when they are completed with the investigation you may see anybody who they may have in their custody.

Q. Did the investigation involve sending for witnesses and identifications and whatnot?

A. It did. In some respects it did not with Cicenia as it did with one or two of the other defendants.

Q. Were you present when Detective Meagher com-
91 pleted his written statement of Cicenia?

A. Yes, I was there. I was not present during the taking of it in its entirety, but I was in and out when Detective Meagher was questioning and reducing his statement to writing.

Q. While this statement was being taken by Detective Meagher, where was Cicenia?

A. With Detective Meagher at a desk talking to Detective Meagher and answering the questions that Detective Meagher asked him.

Q. Right alongside?

A. Yes.

Q. At the same table?

A. At the same desk.

Q. Did you notice whether Detective Meagher was writing out of his own mind, or what was he doing?

A. During part of the time that I was able to stay with him, Detective Meagher would ask a question. Cicenia would answer it. Detective Meagher would write it down and then ask another question or say—then what happened next—or something to that effect, and then would reduce that to writing.

Q. Mr. McKeown, did you know Mr. Taylor?

A. Yes, I did.

Q. He lives in your same——

A. He lived in Maplewood.

Q. What was his business?

92 A. In the Maplewood Electric & Appliance Company at the corner of Baker Street and Maplewood Avenue, Maplewood.

Q. Do you happen to know how he was called in?

A. I called him.

Q. You called him?

A. Yes.

Q. Do you remember what time he got to headquarters?

A. I believe it was after 8 o'clock at night.

Q. Had Cicenia completed his statement when Mr. Taylor arrived, or was it in process of completion?

A. It had not been fully completed when Taylor arrived there.

Q. Do you recall what Mr. Taylor asked Mr. Cicenia with respect to his confession?

A. As I believe Detective Meagher told you that we had—there were a lot of questions, a number of questions that were on a piece of paper.

Q. Do you recall the questions asked by Mr. Taylor as to the treatment by the police?

A. I was present during the interrogation of Mr. Cicenia by Mr. Taylor.

Q. What did he say with respect to that treatment?

A. He asked him how he was treated by the police, and Mr. Taylor was there when the statement was read and read aloud by both Cicenia and Detective Meagher. He was asked if the treatment he had—if the statement was true, if any force——

93 The COURT. You say Mr. Taylor was there. Were you there?

The WITNESS. Oh, yes, I was standing in between Taylor and Cicenia at the time, and Detective Meagher was facing Cicenia more or less. We were in sort of a circle, a semi-circle.

Q. Mr. McKeown, you were there a few hours, were you not, from about 2:30 until 8:30 or something to that effect?

A. I was there until after 1 o'clock.

Q. It was after Corvino had finished his statement?

A. And Taylor also interrogated each of the other defendants.

Q. During the time you were there and from your own personal knowledge was Cicenia subjected to any violence or any duress or any threats with respect to his confession?

A. None whatsoever. As a matter of fact, Mr. Cicenia was very calm and collected.

Q. And was any promise of reward made?

A. None whatsoever.

Q. Do you know whether or not any food was served to Cicenia during that afternoon?

A. As I told you a little while ago, I believe it is my recollection—if it serves me correctly, I met the officers in a restaurant across the street from Police Headquarters at approximately 3 o'clock, or before 3 o'clock, and they brought back food with them and it was sent upstairs to the
94 cell blocks. As far as I know they were the only three men who were confined at that time.

Q. Now, Cicenia said that someone told him to sign that statement or he would not go home. So far as you know do you know of anybody making any such statement?

A. That did not happen.

Q. And he said—although he left you out—he said that you were not present when officers in uniform beat him?

A. I saw but one.

Q. Do you know of any such incident of any officers beating him?

A. No, I do not know of any such incident. While I was present there was no such incident of any kind. As far as I know, there was only one officer in uniform in Police Head-

quarters on that Sunday, and that was the fellow downstairs in the telephone booth.

Cross-examination by Mr. DEBEVOISE:

Mr. DEBEVOISE. May I have the exhibit P–1?

Q. Mr. McKeown, I refer you to Mr. Palmieri's affidavit, which is a portion of his affidavit found at page 7a of Exhibit P–1, and in particular the statement—"As a result of the pressure I was employing, Assistant Prosecutor McKeown descended from the fourth floor at 4:46 P. M. This con-
95 versation took place after McKeown greeted me and acknowledged my relation with the defendant.

'PALMIERI. I want to see Cicenia.

'MCKEOWN. We are not through.

'PALMIERI. I want to see him now, not in a minute or two. You know the law and the rules. Am I not entitled to see him now?

'MCKEOWN. Sure, don't put me on the spot. You will see him.

'PALMIERI. When?

'MCKEOWN. When investigation is completed.

'PALMIERI. When is that?

'MCKEOWN. In a few minutes.

'PALMIERI. I want to see him now and not in a few minutes.

'MCKEOWN. (Walking away and up the stairs.) I will see you in a few minutes.'"

I ask you if that sets forth substantially what happened at 4:46 P. M. on the third floor of the Newark Police Station?

A. Yes, that happened.

Q. And thereafter, after 5 o'clock or shortly after 5, you started taking Mr. Cicenia's statement, or Lieut.—Detective Meagher started taking Cicenia's statement, is that correct?

A. That's right.

96 Q. And you knew when that statement was being taken that Cicenia's attorney was actively or had actively sought to see him?

A. That's right.

Q. And you knew that he had sought to see him through the course of the afternoon until the time he spoke to you and thereafter?

A. That's right.

Q. And the truth of the matter is that you did not permit him to see his attorney until the statement was completed and witnessed by Mr. Taylor, is that not correct?

A. It was not a question of my not permitting him to see him, I wasn't permitting him to see him until the investigation had been completed, and the investigation had not been completed. I was not in charge of the investigation. Lieut. Kinney was in charge of the investigation.

Q. But you know Lieut. Kinney did not let Mr. Cicenia see his attorney?

A. I didn't get your question.

Q. You know as a fact that Lieut. Kinney did not permit Mr. Cicenia to see his attorney during the course of these proceedings?

A. I don't know what Lieut. Kinney had to say, if anything, to Mr. Palmieri.

Q. You know that Mr. Palmieri did not see Mr.
97 Cicenia until after the confession was signed?

A. From the time I spoke to him until the time the confession was completed he did not see him, no.

• • • • •

CARLTON B. NORRIS, called as a witness in behalf of the Respondent, having been first duly sworn, testified as follows:

Direct examination by Mr. CARUSO:

Q. You are a member of the Homicide Squad of the Newark Police Department, are you not?

A. I am, sir.

Q. How long have you been connected with that squad?

A. I am with the squad about eleven years, and the Police Department twenty-five.

Q. And you participated in the investigation of this crime of the killing of this man on Summer Avenue in 1947?

A. I did, sir.

Q. And you were present on the afternoon of December 18, 1949, in Newark Police Headquarters?

A. I was.

Q. Were you engaged in taking anyone's statement?

A. In the afternoon?

Q. Yes.

A. I did.

98 Q. Let me ask you—do you remember seeing Cicenia that day?

A. Yes, sir.

Q. When did you first see him?

A. Well, I received a call from Lieut. Kinney to meet him in Police Headquarters a few minutes after 11. I met him in Police Headquarters and I understood from him that Cicenia was either in Police Headquarters or that he had sent to Orange for him. Anyway, when we arrived there Cicenia was there.

Q. From the time you got there what was your time and effort taken up with?

A. Well, first, this was an old case and we first reviewed the case due to the fact that we understood that these fellows—the three fellows mentioned had—or at least two of them had made some statements to the Orange police linking them with this crime. Of course, when we first saw Cicenia we talked to him and he at that time did tell us a story. The only thing he said at that time was that he was in the car. He had nothing to do actually with the shooting of this person.

Q. But then what happened?

A. Of course, later on——

Mr. DEBEVOISE. Your Honor understands my objec-

99 tion as to what Cicenia said. I made the objection previously and it is repeated at this time.

The COURT. Overruled and noted.

Q. Go ahead.

A. Of course, later on when we talked to Demasi and then we went back to Cicenia he changed his story and he gave the story that you have in the statement.

Q. Did you take anybody's statement?

A. I did, I took Corvino's statement.

Q. And Corvino's statement was taken after the Cicenia statement?

A. Yes.

Q. Later?

A. It was taken after Cicenia—I was just a witness on Cicenia's statement.

Q. I was going to ask you that, Mr. Norris. I notice that you did witness the statement of Cicenia.

A. I did, sir. I sat in while Mr. Meagher took the statement.

Q. Did Mr. Meagher read this statement aloud?

A. He read it aloud to him and he also read the statement aloud in Mr. Meagher's presence and in my presence.

Q. Do you know whether or not any violence or threats of violence were made to Cicenia in the taking of his statement?

A. None, sir.

100 Q. Were any promises of reward made?

A. None, sir.

Q. Were you present when Mr. Taylor got there, this disinterested witness?

A. I was there, yes.

Q. Did you hear Mr. Taylor asking questions with respect to the treatment of the police during that day?

A. Yes.

Q. What did he say in answer to Taylor's question about the treatment of the police?

A. At that time a series of questions had been prepared by the Prosecutor's office and he gave this sheet to Mr. Taylor. Mr. Taylor asked the questions and the young fellow answered them.

Q. You were there until after Corvino finished his statement, and that happened much later?

A. Yes.

Q. Were you present on the following morning in the Police Court?

A. I was in Police Court with Lieut. Kinney.

Mr. CARUSO. I do not want to press this unless there is an objection. I have here, your Honor, a list of questions which Mr. Taylor put to this petitioner, Cicenia, which I would be glad to show counsel to see if there is any objection

101 to that. That is Cicenia's answers to the questions of Mr. Taylor.

Mr. DEBEVOISE. I would want to consult with Mr. Cicenia as to the genuineness of them.

Mr. CARUSO. Suppose I ask the witness whether these questions were asked.

Q. Did you hear Mr. Taylor ask this question of Cicenia? "Is this statement the truth?" Did you hear that?

A. I heard it; yes.

Q. Let us take one at a time without going into this particular piece of paper. Did you hear him answer that question of Cicenia—"Is this statement the truth"?

A. Yes, if that is on there; right.

Q. Do you know of your own knowledge what Cicenia's answer to that was?

A. He said it was.

Q. And the question was asked, "How were you treated by these men?" What was the answer given?

A. Very good or very well, or something to that effect.

Q. "Did you make this statement of your own free will"? What did Cicenia say?

A. Yes.

Q. "Were there any threats or promises made to you to make this statement?"

102 A. No.

Q. "Are there any corrections you want to make in this statement?"

A. No.

Q. "Is there anything you want to add to this statement?"

A. No.

Q. "Has this statement been read aloud to you?"

A. Yes.

Q. "And are you willing to sign this statement?"

A. Yes, sir.

Q. There was something said about not bringing him any food that afternoon. I think, Mr. Morris, you are quite familiar with that practice around Newark Headquarters. Do you know whether he was fed that day?

A. He was, sir. I have the reputation of always——

Q. Of running out for the food?

A. Of bringing the food in.

Q. Did he get any food?

A. He did, sir.

Q. And he said that you were present when some uniformed policemen beat him up, is that so?

A. There were no uniformed policemen in the building. They are not stationed in the building except at the information desk, one man.

Q. And you were present when he signed this state-
103 ment that we have just referred to, weren't you?

A. Yes, sir.

Q. Did anybody tell him in words to this effect—sign or else you won't go home?

A. No.

Q. While Detective Meagher was taking the statement where was Cicenia?

A. He was right alongside of him.

Q. And was Detective Meagher using his own words or was he referring to Cicenia with respect to the confession?

A. He was using the words of Mr. Cicenia.

Cross-examination by Mr. DEBEVOISE:

Q. Detective Norris, you said that no uniformed policeman beat Mr. Cicenia. Did any policeman not in uniform beat Mr. Cicenia?

A. No one beat Mr. Cicenia, sir.

Q. Were there any policemen there other than yourself and Lieut. Kinney?

A. Well, you said police officers. Mr. Meagher is a police officer. Mr. Gross is a police officer.

Q. No one who has not been mentioned heretofore in these proceedings?

A. The only police on the floor in this particular instance would be the doorman. Of course, the cell block is on
104 our floor, and a photographer in the photography room. That is all the policemen that were there, but they were not in our room.

Q. When was the first interrogation of Mr. Cicenia which you referred to in which you stated that he claimed to have been in the car when the murder was perpetrated?

A. That was some time after our arrival there. I wouldn't pin it down to time but it was some time.

Q. Was it early afternoon or late morning?

A. I would say shortly after 12.

Q. Shortly after 12?

A. 12 noon.

Q. That would have been about 3:15 when Detective Meagher reports that he talked to Mr. Cicenia?

A. That's right. I was with Detective Meagher at 3:20 or 3:15 when he talked to him.

Q. You had questioned Mr. Cicenia before Detective Meagher had questioned him?

A. Yes, sir. I don't think Detective Meagher was there.

Q. How long did you question him when you first interrogated him?

A. Maybe twenty-five or thirty minutes.

Q. And then how long was he out of the room after he had told you the story about being in the car?

A. How long was he out of the room?

105 Q. Out of your interrogation room?

A. He could have been in there. You see, on this particular day we used three rooms because we had three defendants. Now, he could have been in the room at that time or he could have been back in the cell block.

Q. How long an interval was there between his first interrogation and his second interrogation?

A. An hour and a half, two hours.

Q. Then did the second interrogation begin at about 3:15?

A. About.

Q. That is where Detective Meagher entered the picture?

A. That's right, sir.

Q. And during the course of this interrogation, or at any time did you hear Mr. Cicenia ask to see counsel?

A. He did not, sir. He never mentioned counsel.

Q. Did you know or were you informed by Lieut. Cohen that Mr. Palmieri had arrived about 2 o'clock and was asking to see Cicenia?

A. I was not, sir.

Q. You were never informed that Mr. Palmieri was asking to see Cicenia?

A. I think I went down and brought Mr. Palmieri up some time after the statement—his statement was finished.

Q. Well, I refer you to page 6a of the affidavit of
106 Frank A. Palmieri contained in Exhibit P–1 and in particular to that portion which reads, "At 4 P. M. Detective Norris connected with the Newark Police Department was called down by Lieut. Cohen. I shook hands with him and I let him know my mission.

"He said, 'I know about it. I can't let you see him. We are working on him. The investigation is not complete.'

"I asked Detective Norris, 'When can I see him?'

"He said, 'I can't tell you.'

"I then said, 'Can I see him in a minute, two minutes, five minutes, when?'

"He answered, 'I can't tell you.'

"I then asked him to step into Lieut. Cohen's office. He did. I told Lieut. Cohen I was Cicenia's attorney and I would like to see him. The Lieutenant asked Norris who said no. The Lieutenant then said, 'You are the boss.'

"I then said to both of them, 'You know the law and the rules. He is entitled to see counsel and still you refuse to let me see him. Do you have a warrant?'

"Detective Norris said yes."

I ask you if that in substance is what occurred about 4:30 P. M. at the Newark Police Department?

A. I never had such a conversation with Mr. Pal-
107 mieri like that. No conversation like that. In the first place, I am not in charge and it would not be within my scope to even have a conversation with him like that.

Q. And it is your contention you had no conversation with Mr. Palmieri?

A. Except at the time.

Q. At 4 P. M. or thereabouts?

A. No, sir.

Q. He did not ask you to see Mr. Cicenia?

A. No, sir. I am not in charge.

Q. And when Detective Meagher was taking the statement at 5:15 to 5:30, at that time did you know that Mr. Palmieri was outside trying to see his client, Mr. Cicenia?

A. Honestly, I didn't.

Q. And did you know when Mr. Cicenia was being asked the questions by Mr. Taylor, and was being asked to sign the confession, that Mr. Palmieri was waiting outside and wishing to see him?

A. By that time I had heard that he had an attorney and that an attorney was there, but I wasn't interested. I mean, we have that every day. I mean, attorneys bother us. The minute somebody is arrested they are there and want to get in. I mean, it comes in one ear and out the other. We pay no attention to them.

Q. You don't let attorneys in until the statement is
108 obtained?

A. That has no—I wouldn't say that either.

Q. Well, you did not—you said that you did not let attorneys in and in this case you would not let Mr. Palmieri in?

A. Well, you see, we have a certain obligation that we owe to the public. When we have a serious crime we endeavor to protect everybody, the client—I mean the defendant—and the public. We have a dual job.

* * * * * *

109 THOMAS CICENIA, recalled as a witness in behalf of the petitioner in rebuttal, having been previously sworn, testified as follows:

Direct examination by Mr. DEBEVOISE:

Q. Mr. Cicenia, you testified previously that you were with Mr. Palmieri at the Newark Police Station on the Sunday in question. Did you at any time while you were there see Detective Norris?

A. Yes.

Q. Would you point out Detective Norris for us?

A. The man with the glasses sitting in the front chair on the end.

Q. Did you hear the statement of Mr. Palmieri which I just read to Detective Norris when he was on the stand?

A. Yes.

Q. And does that statement accord substantially with what you saw and heard on Sunday, the Sunday in question?

A. Yes.

Q. Did you see Detective Norris talk with Mr. Palmieri at or about 4 o'clock that afternoon?

110 A. I did.

Q. Did you hear Mr. Palmieri ask Detective Norris, or words to that effect, if he could see Mr. Cicenia?

A. Yes.

Q. And in your presence did Detective Norris refuse to permit Mr. Palmieri to see Mr. Cicenia?

A. Yes.

* * * * *

111 In United States Court of Appeals for the Third Circuit

No. 12,011

IN THE MATTER OF THE APPLICATION OF VINCENT CICENIA FOR A WRIT OF HABEAS CORPUS. VINCENT CICENIA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge*, KALODNER, *Circuit Judge*, and KRAFT, *District Judge*.

Judgment

January 7, 1957

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[File endorsement omitted.]

112 In United States Court of Appeals for the Third Circuit

No. 12,011

IN THE MATTER OF THE APPLICATION OF VINCENT CICENIA FOR A WRIT OF HABEAS CORPUS. VINCENT CICENIA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 4, 1956

Before BIGGS, *Chief Judge*, KALODNER, *Circuit Judge*, and KRAFT, *District Judge*.

Opinion of the Court

Filed January 7, 1957

PER CURIAM.

The case of the appellant has been ably presented to us by counsel appointed by the trial court. Every issue of the case has been covered adequately by Chief Judge Forman in his thorough opinion, F. Supp. , and it would be a work of supererogation to repeat the arguments of the parties here and deal with them anew.

The decision of the court below was correct in all respects. Until the Supreme Court of New Jersey reverses its holding that an accused may be denied the opportunity to consult with counsel during the period of police interrogation between arrest and arraignment and that the right
113 to counsel contemplates only assistance of counsel at the trial, and preparation for trial of the case, State v. Grillo, 11 N. J. 173, 93 A. 2d 328 (1952), or until the Supreme Court of the United States reverses the Supreme Court of New Jersey in these respects we cannot hold that an accused was denied due process of law under circumstances such as those at bar. We repeat, however, what the trial court said, that "This result is reached without enthusiasm."

The judgment appealed from will be affirmed.

114 Supreme Court of the United States

No. 586 Misc. ——

October Term, 1956

VINCENT CICENIA, PETITIONER

v.

R. WILLIAM LAGAY, SUPERINTENDENT OF NEW JERSEY STATE PRISON FARM AT RAHWAY, NEW JERSEY

On petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Order granting motion for leave to proceed in forma pauperis and petition for writ of certiorari

June 10, 1957

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 1072 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this application.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 177

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm, at Rahway, New Jersey.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER, VINCENT CICENIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 177

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm, at Rahway, New Jersey.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER, VINCENT CICENIA

Opinions Below

The opinion of the United States District Court for the District of New Jersey is set forth at 148 F.Supp. 98 (1956).

The opinion of the Court of Appeals for the Third Circuit is set forth at 240 F.2d 844 (1957).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 7, 1957 (R. 123).

Within the time prescribed by 28 U.S.C. §2101 (c) petitioner served and filed his petition for a writ of certiorari to the Court of Appeals as authorized by 28 U.S.C. §1254 (1).

In this case petitioner was held incommunicado for many hours while police officials questioned him and ultimately obtained a confession from him. During that time petitioner's attorney was at the police station and repeatedly asked to see petitioner. The police officials prevented him from consulting with his client until the confession was signed. Thereafter neither petitioner nor his attorney were allowed to examine the confession. A question of due process arises.

The facts of this case raise the important question of federal law of whether police officials may thus deny to the accused the opportunity to consult with his attorney and of whether the prosecution may deny a defendant the opportunity to examine a statement so obtained.

It is submitted that the rationale of recent United States Supreme Court cases condemns such practices as a violation of the due process clause of the Fourteenth Amendment. It is further submitted that the precise facts of this case have not previously been before this Court and present a question which has not been, but should be, settled by this Court.

Constitutional Provision Involved

The constitutional provision involved in this case is the Fourteenth Amendment of the Constitution of the United States, the pertinent portion of which is as follows:

> Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A., Constitution, Amendment 14.

Question Presented for Review

Was a defendant, who was arrested by police, held incommunicado for prolonged questioning before arraignment and who was denied the opportunity to confer with his attorney until he had signed a confession to the crime of murder, deprived of his rights under the Fourteenth Amendment of the United States Constitution when the existence of the confession, in conjunction with the refusal of the prosecuting authority to permit either inspection or suppression of the confession, induced defendant to plead *non vult* to the crime with which he was charged?

Statement of the Case

This Court has granted the petition of Vincent Cicenia for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a judgment entered on January 7, 1957, affirming a judgment of the United States District Court for the District of New Jersey denying petitioner's application for a writ of habeas corpus.

The facts upon which petitioner relies are, in the main, undisputed. Stripped to their essentials, they are as follows:

Petitioner, one of eight children, and the child of an immigrant father, had a grade school education and attended vocational school for two years (R. 66, 67). Upon leaving school he worked as a painter and construction

worker (R. 68). He was twenty-one years of age when arrested and questioned in the manner described below (R. 66, 68).

On December 17, 1949 police officers of Orange, New Jersey, called at petitioner's home and not finding him there, left instructions with his family that he was to report to police headquarters (R. 68, 87-88). The following day, upon the advice of his attorney, Frank A. Palmieri, petitioner went to headquarters at 9:00 a.m. with his father and brother. He was immediately placed in custody and held apart from his family (R. 69, 88-89, 90).

Neither petitioner nor his family knew at the time that he was being held for questioning in connection with the murder of Charles Kittuah, which had occurred on March 17, 1947, over two years prior to petitioner's arrest (R. 69, 87).

Petitioner was taken to Newark Police Headquarters, arriving at about 10:00 a.m. (R. 80). Thereafter he was subjected to interrogation by representatives of the Newark Police Department and of the Essex County Prosecutor's Office (R. 70-73, 95-96, 102-104, 110, 116).

At about 2:00 p.m. petitioner's attorney arrived at the Newark Police Headquarters and requested to see petitioner. The request was refused (P. Ex. 1, R. 23, 7). Repeatedly thereafter throughout the course of the afternoon Mr. Palmieri asked to see his client, without avail (P. Ex. 1, R. 24-26; R. 91, 111, 114, 122). As explained at the hearing before the United States District Court by Newark Detective Carlton B. Norris:

> "By that time I had heard that he had an attorney and that an attorney was there, but I wasn't interested. I mean, we have that every day. I mean, attorneys bother us. The minute somebody is arrested they are

there and want to get in. I mean, it comes in one ear and out the other. We pay no attention to them" (R. 122).

Not until 9:30 p.m., after petitioner had signed a seven page confession which had required at least an hour to prepare, was Mr. Palmieri permitted to confer with him (P. Ex. 1, R. 24; P. Ex. 1, R. 32; R. 73, R. 105).

At 11:00 a.m. on December 19, 1949, petitioner was finally arraigned before Judge Jacobs, at which time a complaint was made and read to petitioner charging him with murder. He pleaded not guilty (R. 74). Thereafter petitioner and two co-defendants were indicted for the murder of Charles Kittuah (P. Ex. 1, R. 21, 7).

Mr. Palmieri proceeded to prepare petitioner's defense. Having been denied the opportunity to consult with petitioner during the hours when petitioner was held without warrant or complaint and during which a statement was obtained from him, Mr. Palmieri sought leave to inspect the confession so obtained. He moved for an order directing the Prosecutor to produce petitioner's and his co-defendants' confessions for inspection prior to the trial of the cause and for suppression of petitioner's confession (P. Ex. 1, R. 22, 7).

The motion was denied by the Essex County Court (P. Ex. 1, R. 36, 7). On appeal the Appellate Division affirmed *State* v. *Cicenia*, 9 N.J. Super. 135, 75 A.2d 476 (App. Div. 1950), and though the New Jersey Supreme Court modified the judgment of the Appellate Division, it sustained the denial of petitioner's motion to inspect his confession and for suppression, *State* v. *Cicenia*, 6 N.J. 296, 78 A.2d 568 (1951).

Mr. Palmieri thus found himself in the position of having been denied the opportunity of seeing petitioner during the

crucial period when the state was trying to obtain a confession from him, and of then being denied the opportunity of seeing the confession so obtained. He was faced with the problem that even if he succeeded in preventing admission of the confession in evidence at trial, the jury would be well aware of its existence by virtue of the fact that the jury would hear all the evidence relating to the voluntariness of the confession.

Under such circumstances it is not surprising that Mr. Palmieri recommended to petitioner that he plead *non vult* to the indictment and that petitioner followed the recommendation. On March 29, 1951, such a plea was entered (P. Ex. 2, R. 53, *et seq.*, 7). The importance of the confession obtained under the dubious circumstances prevailing in this case is made strikingly apparent by the remarks made to the Court by Assistant Prosecutor Guiliano when the plea was taken:

> "There are no eyewitnesses to the murder, your Honor, and the State must rely solely, if this case went to trial, on the statements which the defendants gave to the police after their apprehension. The State feels that it would be difficult to convince a jury to return a verdict of guilty of murder in the first degree, which would mean the death penalty, from the facts that it has or the evidence that it has in its possession. As I said before, there are no eyewitnesses to this killing, and the only evidence that the State has against these three defendants; that is, direct evidence, would be their own statements. In view of that fact and of those circumstances that I have just related, I feel that the State should recommend the acceptance of a plea of non vult by each of these defendants to the indictment" (P. Ex. 2, R. 56, 7).

On April 18, 1951, petitioner was sentenced to imprisonment at hard labor for life in State's Prison (P. Ex. 2, R. 65, 7).

In December of 1953 petitioner filed in the Essex County Court an application for a writ of habeas corpus on the grounds that he had been unlawfully arrested, that there had been an unreasonable delay in his arraignment and that he had been denied the right of counsel. On January 21, 1955, the late Judge Conlon determined that petitioner was not entitled to release by way of habeas corpus and an order was entered discharging the writ (R. 8). The Superior Court of New Jersey, Appellate Division, affirmed the judgment of the County Court on July 11, 1955 (R. 8). Petitioner then moved in the Supreme Court of New Jersey for leave to appeal as an indigent, which motion was denied on September 12, 1955 (R. 8). Petitioner applied to the Supreme Court of the United States for a writ of certiorari to review the order of the New Jersey Supreme Court. His petition was denied on December 13, 1955 (R. 8).

Thereafter petitioner filed his application for a writ of habeas corpus in the United States District Court, which, after hearing, was denied by an order dated July 17, 1956 (R. 19). On appeal to the Court of Appeals for the Third Circuit, the decision was affirmed by an order dated January 7, 1957 (R. 123). Thereafter this Court granted a petition in this cause for a writ of certiorari (R. 125).

Summary of Argument

When the Newark, New Jersey, police officials held petitioner for a period of about twelve hours, during which time they subjected him to interrogation and refused to admit his attorney until petitioner had signed a confession, they violated petitioner's right to counsel, secured

to him by the Due Process Clause of the United States Constitution.

Refusal to permit a suspect to confer with his attorney during preliminary police investigation until he signs a statement encourages use of the "Third Degree" and other unfair practices, which are vicious in themselves and which result, upon occasion, in the conviction of innocent persons. Uncontrolled police interrogation of suspects is not essential to effective law enforcement.

Under existing law, as set forth in the decisions of the United States Supreme Court, petitioner in this case is entitled to relief.

The refusal of the New Jersey courts to permit petitioner to examine prior to his trial the confession obtained from him under the circumstances of this case constituted an additional violation of his Constitutional rights.

Petitioner did not waive his right to seek relief in the federal courts by pleading *non vult* to the crime charged. The maximum possible sentence on such a plea was life imprisonment, and the maximum sentence after a trial was death. The existence of the confession, obtained from him when he was denied the right to consult with counsel, induced him to plead *non vult* rather than run the risk of receiving the death penalty.

ARGUMENT

Point I

Petitioner Was Deprived of Assistance of Counsel in Violation of the Fourteenth Amendment of the United States Constitution.

A. *The Issue:* A fundamental issue is presented by the facts of this case. The Newark police held petitioner for a period of ten to twelve hours prior to his confession. During the last seven and one-half of those hours petitioner's attorney actively sought to confer with petitioner. The Newark police and an official of the Essex County Prosecutor's Office declined to permit so much as a conference between attorney and client until they obtained what they wanted. Their attitude towards the requests of attorneys was frankly described by respondent's own witness, Detective Norris, who stated as to such requests, "I mean, it comes in one ear and out the other. We pay no attention to them."

The Court in this case must decide whether advice and assistance of counsel is a fundamental right to which an accused is entitled or whether it is a mere shibboleth, recognized only when it is convenient for police officials to do so.

It is respectfully submitted that the Courts below erred in holding that lack of counsel at the time of police interrogation in the circumstances of this case did not invalidate the confession. In spite of its holding, however, the District Court clearly recognized that the practices of the Newark police and of the Essex County Prosecutor's Office were a mockery of the right of assistance of counsel.

> ". . . Despite these considerations one cannot help stating that a personal reaction to the manner in which

> the police chose to extract petitioner's confession from him is a highly adverse one. Not only was petitioner deprived of a cherished American right—the right to see a lawyer—but the dignity of the legal profession itself was demeaned when the police and an assistant prosecutor arbitrarily refused to permit this petitioner's counsel to perform the traditional role of the lawyer in informing an accused of his rights . . ." (R. 16).

The repugnance of the District Court was echoed by the Court of Appeals in this case when it felt obliged to affirm the judgment denying relief. The Court stated, "We repeat, however, what the trial court said, that 'This result is reached without enthusiasm'" (R. 19).

B. *Basic Principles Involved:* If one considers the implications of holding that a suspect may not see his attorney until police officials have obtained from him such statements as they need, it becomes readily apparent why the courts below were so reluctant to rule as they did.

We have long been proud that our system of prosecution for crime is accusatorial rather than inquisitorial, depending upon careful investigation rather than upon gruelling interrogation of suspects.

> "Such constitutional restraints of decency derive from reliance upon the resources of intelligence in dealing with crime and discourage the too easy temptations of unimaginative crude force, even when such force is not brutally employed." *Haley* v. *Ohio*, 332 U.S. 596 at p. 606, 92 L.Ed. 224 at p. 232 (1948) (Justice Frankfurter's opinion).

> "Under our system society carries the burden of proving its charge against the accused not out of his

> own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts* v. *Indiana*, 338 U.S. 49 at p. 54, 93 L.Ed. 1801 at p. 1806 (1949).

This Court has recognized the evils of uncontrolled interrogation of an accused by police, which smacks of the inquisitorial system of prosecution.

> "Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards." *Watts* v. *Indiana, supra*, U.S. at p. 55, L.Ed. at p. 1806.

Recognition of an accused's right to the assistance of counsel is one important way by which abuse of police interrogation can be curbed, and its absence leads only to the most vicious evils of uncontrolled questioning.

> "No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion." *Haley* v. *Ohio, supra*, U.S. at p. 600, L.Ed. at p. 229.

There are many evils inherent in the practice of permitting police to interrogate suspects for unlimited periods of time without granting the suspect the right of counsel and permitting statements obtained from the suspect to be used against him.

In the first place, it presents a tempting opportunity for the police to use violence to coerce the accused into giving a confession or other statement, and the accused is usually

in such a position that he cannot later establish that the statement was coerced.

The usual situation is that the accused is questioned in the presence of a number of police officials. At the trial for the offense with which the suspect is charged, the question of the voluntariness of the confession is a factual question to be decided on the basis of the evidence before the court. The evidence will consist of the testimony of the accused as to any coercive measures used, and pitted against that will be the testimony of a number of police or prosecutor personnel that no coercion was used. If the evidence is conflicting the trier of facts (whether the judge or the jury) is entitled to draw either conclusion. Inevitably the trier of facts will, on occasion, be wrong.

The accused is in an even worse position in a habeas corpus proceeding when he attempts to show that a confession used against him was coerced. The law is clear, that if the confession was coerced, a conviction based thereon is invalid, e.g., *Watts* v. *Indiana, supra.* But a federal court will not find as a fact that he was coerced if the evidence is in conflict, as it usually is when such an issue is raised, e.g., *United States* v. *Murphy,* 222 F.2d 698 (2d Cir. 1955), *cert. denied,* 350 U.S. 896, 100 L.Ed. 788 (1955).

It is impossible to state how frequently police use improper methods of questioning suspects. It can be established that resort to such methods of questioning is not infrequent, *The Third Degree,* 43 Harv. L. Rev. 617 (1930).

> "How common are these practices? No one really knows. Because an accused officer will almost always deny that he indulged in them, and because they are conducted in secret, statistics are difficult, almost impossible to get. Yet it is common knowledge that the third degree, in recent years, has been applied in al-

most every state of the Union. Numerous trial records mention instances where it has been exposed, and an American Bar Association committee said in a report made in 1930, 'For every one of the cases which . . . find a place in the official reports, there are many hundreds and probably thousands, of instances of the use of the Third Degree in some form or other.'" Frank and Frank, *Not Guilty* (Doubleday & Company, Inc. 1957) at p. 181.

A contrast of English and American experience with coerced confessions suggests the extent which uncontrolled preliminary examination leads to such confessions. A study made in 1930 reviewed the multiplicity of extorted confessions in the United States in contrast to the virtually complete absence of such confessions in England, where preliminary examination is severely limited, *The Third Degree*, 43 Harv. L. Rev. 617 (1930).

One means of avoiding coercion or other equally unfair practices, is to enforce the right of an accused to consult with his counsel at every stage of the proceedings against him, including his interrogation by police.

Physical coercion is not the only evil which the absence of counsel encourages. Mental coercion may be used with equally unfair results. The experience of United States troops in the Korean War demonstrated that most men have a breaking point when subjected to prolonged pressure designed to elicit an admission of some fact. Meerloo, *The Rape of the Mind: The Psychology of Thought Control, Menticide and Brainwashing* (The World Publishing Company, 1956).

"But policemen have discovered that they need neither intricate devices nor violence. The easiest way to persuade a man to confess to whatever you want is

to deprive him of sleep beyond the point of normal exhaustion, questioning him endlessly. As a Louisiana judge put it, 'I myself might make a false confession of having murdered my own father if I were kept awake and prodded with questions.' " Frank and Frank, *supra,* at p. 181.

If confessions obtained either through violence or through other unfair treatment of an accused held without benefit of counsel came only from guilty persons there might be something (although not much) to be said in favor of such treatment. The fact of the matter is, however, that upon occasion the innocent as well as the guilty succumb to such tactics, pleading guilty to crimes they did not commit.

One author has reviewed a number of cases in which the innocent have been convicted, often on the basis of false confessions, Borchard, *Convicting the Innocent* (Yale Univ. Press 1932).

". . . While confessions may often seem conclusive, they must be carefully examined. Persons charged with crime are not infrequently of defective or inferior intelligence, and, even without the use of formal third-degree methods, the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result. State's Attorney Homer Cummings, in the Connecticut case of Israel, who under pressure confessed the murder of a priest, but whom Mr. Cummings refused to try, said:

'It was the opinion of the physicians that any confession made by the accused was totally without value, and they were of the opinion also that if they cared to subject the accused to a continuous and fatiguing line of interrogation, accusation and suggestion, in due course he would be reduced to such a

> mental state that he would admit practically anything his interrogators desired. They further stated that this was a common phenomenon with certain types of people, and that where such people are subjected to interrogations, accusations or suggestions from persons of stronger will, the lesser mind will ultimately succumb and accept the conclusions of the more powerful intellect.'" Borchard, *opus cited supra* at pp. xvii, xviii.

More recently, the late Judge Jerome Frank and his daughter described other instances where the innocent paid for the crimes of the guilty, often as a result of confessions obtained during uncontrolled police interrogation.

> "Within the past year, a distinguished public prosecutor remarked that a conviction of an innocent man is a 'rare exception'. The cases described in this book, together with earlier cases reported by Borchard in 1932 in his great book, *Convicting the Innocent*, will alone serve to show that the number of known cases of that kind is not inconsiderable. But what of the undiscovered cases? No one can possibly learn how many an innocent is now in prison, or died in the government's electric chair or gas chambers, for want of a disclosure that he did not commit the crime." Frank and Frank, *supra*, at pp. 35, 36.

It is too much to hope that errors will never be made in the enforcement of the criminal law. But it is not too much to expect that all practical measures to reduce the frequency of such errors will be taken. Permitting an accused to consult with his counsel during police interrogation is one method of eliminating false confessions, which are a substantial cause of many wrongful convictions.

The so-called "practical" argument advanced to support the contention that police should be permitted to question suspects prior to arraignment and without counsel is that such interrogation is a necessary tool in successful law enforcement, see the concurring opinion of Justice Jackson in *Watts* v. *Indiana, supra.*

Experience, however, suggests that this argument applies primarily where law enforcement authorities lack the trained personnel and equipment necessary to properly investigate criminal acts. When such personnel and equipment are lacking, greater reliance must, perhaps, be placed upon relentless interrogation of suspects.

But where adequate resources are devoted to law enforcement, reliance need not be placed upon such primitive techniques as those employed in this case by the Newark police. For example, the F.B.I., whose effectiveness is generally admitted, has no need to resort to such methods, see *United States* v. *Murphy, supra.*

Similarly, English law enforcement has functioned effectively for generations even though statements made by a suspect to police officials are viewed with a scrutiny far more severe than in the United States, see discussion in *Ibrahim* v. *Rex*, The Law Reports, Appeal Cases (1914) (Privy Council); *Rex* v. *Knight and Thayre*, 20 Cox's C.C. 711 (1905) (a confession obtained after six hours of police interrogation without threats or inducements excluded).

Application of the English rule requires that confessions obtained during preliminary interrogation of a suspect by police be regarded with the gravest suspicion:

> ". . . In this case the statements were made after arrest of the accused in answer to questions put by the chief constable. In such a case it is not, in my opinion, sufficient for the prosecution to show that no induce-

ments were put forward by way of threat or promise, express or implied. The arrest and charge are in themselves a challenge to the accused to speak; and inducement within the rule." *Rex* v. *Kay*, 9 C.C.C. 403 (1904) (a Canadian case) as quoted in MacDonald & Hart, *Admissibility of Confessions*, 25 Canadian Bar Review 823 (1947).

The purpose of noting the English position on the subject of confessions, of course, is to indicate that effective law enforcement does not depend upon the use of confessions obtained after protracted police interrogation.

The fact that local governments are unwilling to appropriate the resources which would be required for effective solution of crimes without depriving suspects of such time-honored rights as assistance of counsel would seem a totally inadequate ground for a federal court to eliminate or severely curtail such right.

> "Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accommodated to the constitutional guaranties of the individual." *Williams* v. *Kaiser*, 323 U.S. 471 at p. 476, 89 L.Ed. 398 at p. 403 (1945).

The above considerations should suggest why assistance of counsel during police interrogation taking place after arrest and prior to arraignment is a fundamental right, denial of which emasculates the recognized right of an accused to counsel. The importance of counsel throughout all the proceedings was pointed out by Justice Murphy in his dissenting opinion in *Canizio* v. *New York*, 327 U.S. 82, 90 L.Ed. 545 (1946):

> "In my opinion, however, the right to counsel means nothing unless it means counsel at each and every step in a criminal proceeding. The failure at any particular point to have representation or to be aware of one's right to counsel may have an indelible and imponderable effect upon the entire proceeding, an effect which may not be erasable on the day of imposing the sentence." U.S. at p. 89, L.Ed. at p. 550.

The instant case is strikingly illustrative of the wisdom of Justice Murphy's remarks. The effects of the unlawful deprivation of counsel were indeed imponderable. The confession undoubtedly resulted therefrom. That confession hung like a sword poised over petitioner throughout all the subsequent proceedings. Its influence upon the petitioner's decision to plead cannot but have been profound. He was undoubtedly advised by his attorney that had he gone to trial the trial judge might have refused to admit such a confession in evidence. But he must also have been advised of the probable effect upon a jury of hearing the prosecutor refer to such confession and of hearing all the evidence relating to the voluntariness of the confession, as is the practice under New Jersey law, *State* v. *Vaszorich*, 13 N.J. 99, 98 A.2d 299 (1953).

> "Even if the accused can hire an attorney, police officers taking him into custody can deny him an opportunity to retain counsel without incurring serious risk that a confession they exact from him will be invalidated. The stark truth of the matter is that a guarantee of counsel only at the trial stage is in many cases a mere shell, affording the defendant little or no real benefit and not at all satisfying the basic requirements of fairness and justice. The ideal time at which an accused should be allowed to retain counsel or have counsel assigned is immediately after his arrest . . .

It is submitted that the only way to accomplish this result is to strictly enforce the right, which he has already in theory, by rendering inadmissible evidence obtained from the defendant after he has been refused opportunity to obtain and consult counsel." Downing, *Right to Counsel Prior to Trial*, 44 Ky. L.J. 103 (1955) at p. 111.

The effect of the Court's decision in this case will be profound. As a practical matter if the judgment below is affirmed, the Court will be ruling that a suspect has no right of counsel during police interrogation prior to arraignment, and that the police may continue such interrogation until they obtain what they need from a suspect. Mere verbal support of the right of counsel would have little utility.

> "But, altogether too often, the upper court affirms a conviction, contenting itself with a rhetorical flourish about the prosecutor's unseemly conduct, remarking that he failed to act as 'an officer of the court,' a 'servant of the law,' and had gone far 'beyond the canons of decorum . . . which a governmental officer should observe.' Such remarks, without more, may be worse than useless. Practically, they add up to actual approval of the criticized misconduct. For the kind of prosecutor who, eager to procure a conviction, resorts to such improper tactics, will act on the assumption that almost always, in the future as in the past, the courts will merely express displeasure and will not upset the prosecutor's victories. The court's deprecatory words become purely ceremonial. The misbehaving but victorious prosecutor gladly pays what to him is a small price —a ritualistic verbal spanking, a mere slap on the wrist." Frank and Frank, *supra* at pp. 238, 239.

If, on the other hand, this Court reverses the judgment below, it will sustain a cherished right not only for this peti-

tioner, but for countless others, for the innocent as well as for the guilty. It will sustain a right which, it is submitted, is his by virtue of the United States Constitution.

C. *The Law:* In candor it must be stated that the highest courts of New Jersey have ruled that an accused may be denied the opportunity to consult with counsel during the period of police interrogation between arrest and arraignment, and that the right to counsel contemplates only assistance of counsel in the trial, and preparation for trial, of a case.

> *State* v. *Grillo*, 11 N.J. 173, 93 A.2d 328 (1952);
> *State* v. *Bunk*, 4 N.J. 461, 73 A.2d 249 (1950);
> *State* v. *Cole*, 136 N.J.L. 606, 56 A.2d 898 (E. & A. 1948);
> *State* v. *Murphy*, 87 N.J.L. 515, 94 Atl. 460 (E. & A. 1915).

Although the New Jersey position has support in certain other jurisdictions,

> E.g., *State* v. *Sullivan*, 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973, 100 L.Ed. 844 (1956);
> *People* v. *Crooker*, 47 Cal. 2d 348, 303 P.2d 753 (Supr. Ct. 1956), *cert. granted*, —— U.S. ——, 1 L.Ed. 2d 1426 (1957);
> *State* v. *Rogers*, 143 Conn. 167, 120 A.2d 409 (Sup. Ct. of Err. 1956), *cert. denied*, 351 U.S. 952, 100 L.Ed. 1476 (1956),

there is widespread protest against such a harsh rule:

> "There is no significant difference between denial of counsel at the trial and such denial before trial to the point that no trial lawyer could be effective, no matter how skilled. The failure to have counsel in regard to all

matters up to and through the arraignment and plea 'permeates the entire proceeding, with indelible effects that could not be removed.' The error was done; the damage was committed." *Application of Sullivan*, 126 F.Supp. 564 at p. 571 (C.D. Utah 1954), *rev'd* 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973, 100 L.Ed. 844 (1956).

"The defendant's confession was undoubtedly an important factor in defendant's conviction of the crime of which he was accused. The confession was made without benefit of counsel which had been requested by defendant. It appears to me that if our constitutional safeguards are to be observed, they should be observed to the letter." *People* v. *Crooker, supra*, 303 P.2d at p. 761 (dissenting opinion).

"However, if the two removals of the defendant and the two detentions were the only illegal acts perpetrated on him, one might deplore them without necessarily challenging the voluntariness of the confession that followed. But where we are met with orders barring an accused from conferring with his counsel, we reach what seems to me to be constitutional illegality. . . . Such orders involve the denial of due process guaranteed by the fourteenth amendment to the federal constitution. . . . " *State* v. *Rogers, supra*, 120 A.2d at pp. 415, 416 (dissenting opinion).

The decisions of the courts of New Jersey, however, are not dispositive of the question whether petitioner was deprived of counsel in violation of a right protected by the Fourteenth Amendment of the United States Constitution. Such a question is to be resolved by federal law, *Williams* v. *Kaiser*, 323 U.S. 471, 89 L.Ed. 398 (1945).

Under federal law, it can hardly be disputed that a person accused of a capital offense under the circumstances of

the present case is entitled to counsel at some point in the proceedings, *Uveges* v. *Pennsylvania*, 335 U.S. 437, 93 L.Ed. 127 (1948). The right to counsel is a right to *effective* counsel. For example, counsel must be given adequate time to prepare his case, *Hawk* v. *Olson*, 326 U.S. 271, 90 L.Ed. 61 (1945); assigned counsel must conscientiously fulfill his responsibilities, *White* v. *Ragen*, 324 U.S. 760, 89 L.Ed. 1348 (1945).

> "That Amendment (The Fourteenth) is violated also when a defendant is forced by a state to trial in such a way as to deprive him of effective assistance of counsel." *Hawk* v. *Olson, supra*, U.S. at p. 276, L.Ed. at p. 65.

Effective assistance of counsel requires such assistance be available during any significant proceedings in the cause, *Chandler* v. *Fretag*, 348 U.S. 3, 99 L.Ed. 4 (1954).

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell* v. *Alabama*, 287 U.S. 45 at p. 57, 77 L.Ed. 158 at p. 164 (1932).

Until recently it might have been argued that this Court had not decided whether refusal by police to permit an accused person to consult with his attorney during protracted interrogation designed to elicit a confession is a violation of due process, *Anderson* v. *Treat*, 172 U.S. 23, 43 Sup. Ct. 351 (1898) (question raised but not decided).

Even before the more recent Supreme Court cases which, it is submitted, sustain the right to consult with counsel during police interrogation, the implication was strong that such a right would be enforced.

In those cases which held that under the circumstances prevailing therein a petitioner was not entitled to a writ of habeas corpus even though he did not have counsel at any early stage in the proceedings, the Court was careful to point out that petitioner had not been prejudiced by absence of counsel, e.g. *Canizio* v. *New York*, 327 U.S. 82, 90 L.Ed. 545 (1946).

> "While district attorneys should *always* honor a request of counsel for an interview with a client, upon the record before us there is no showing of prejudice." *Stroble* v. *California*, 343 U.S. 181 at p. 198, 96 L.Ed. 872 at p. 885 (1952). (Italics supplied.)

In the present case, the prejudice resulting from refusal of the law enforcement officials to permit petitioner's attorney to consult with his client was drastic and irremediable.

The Court of Appeals for the Second Circuit faced an issue similar to the one presented in this matter, *United States* v. *Murphy*, 222 F.2d 698 (2nd Cir. 1955), *cert. denied*, 350 U.S. 896, 100 L.Ed. 788 (1955). The facts of that case closely resemble those prevailing in the instant one.

The petitioner in the *Murphy* case was taken into police custody, and interrogation (presumably unaccompanied by violence) proceeded until a confession was given. The Court condemned the police methods employed in the harshest terms, stating:

> "Alone or together, neither the unlawful detention for many hours nor the deceit in confronting Caminito

with disguised police officers who lied in identifying him would suffice to vitiate the confessions as unconstitutionally obtained. But those factors did aggravate the following unconstitutional practices which—even in the absence of those factors—rendered the confession inadmissible: (a) The police interrogated him almost continuously for 27 hours, with but a brief interval for rest in a cell so badly equipped as to make sleep virtually impossible for a man already harried by the questioning. (b) During this long period, the police, in effect, kidnapped him: They kept him incommunicado refusing to allow his lawyer, his family, and his friends to consult with him.

"Accordingly, the writ of habeas corpus must issue. . . ." at pp. 700, 701.

During the past year, moreover, two Supreme Court decisions gave added support to the right of counsel in circumstances such as those prevailing in the present case. The recent decision of *Fikes* v. *Alabama*, 352 U.S. 191, 1 L.Ed. 2d 246 (1957) indicates what the Court's decision would be were that the sole issue.

In that case the majority placed great stress on the fact that during the protracted period of questioning, the defendant was not allowed to receive his father or an attorney who wished to see him. The opinion of the dissenting Justices would appear to indicate that they would change their position if an accused were prohibited from having his attorney see him.

"I am not satisfied that there was any deliberate purpose to keep the petitioner incommunicado, such as existed in Watts v. Indiana, Turner v. Pennsylvania, and Harris v. South Carolina (U.S.) all supra. Before the first confession, petitioner, at his own request, was

permitted to see the sheriff of his home county, and his employer. His father, although not permitted to see petitioner on the day of his first confession, was allowed to see him before the second confession. *The lawyer who sought to see petitioner was refused permission because, having no authority from petitioner or his family to present him,* the prison authorities evidently thought he was trying to solicit business." Dissenting opinion 352 U.S. at pp. 200, 201, 1 L.Ed. 2d at 253. (Italics supplied.)

Mr. Palmieri had the requisite authority from the petitioner and his family to represent the petitioner. The police were aware of this fact as was the Assistant Prosecuting Attorney. To thus deny the petitioner his right to have his counsel see him when merely separated by a door constitutes a shocking disregard of the civilized standards recognized by the Anglo-American world.

The case of *In re Groban*, 352 U.S. 330, 1 L.Ed. 2d 370 (1957) suggests even more strongly that exclusion of counsel during preliminary examination in a criminal case is a violation of due process.

That case concerned an Ohio Fire Marshal's investigation of the cause of a fire on petitioner's premises. The petitioner's attorney was not permitted to attend the hearings, and when the petitioner refused to be sworn under such circumstances he was imprisoned. Although this Court held that petitioner was not entitled to counsel because the matter was in the nature of an administrative investigation, it noted that the rule would be otherwise in a criminal matter.

"It is clear that a defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel . . . Prosecution

of an individual differs widely from administrative investigation of incidents damaging to the economy or dangerous to the public. The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire." 352 U.S. at p. 332, 1 L.Ed. 2d at p. 380.

The dissenting opinion attacks more strongly the practice of questioning a suspect without permitting the presence of counsel.

"I believe that it violates the protections guaranteed every person by the Due Process Clause of the Fourteenth Amendment for a state to compel a person to appear alone before any law-enforcement officer and give testimony in secret against his will." 352 U.S. at p. 337, 1 L.Ed. 2d at p. 383.

"The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced." 352 U.S. at pp. 340, 341, 1 L.Ed. 2d at p. 385.

"Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of

the interrogators, as a practical matter, he is subject to their uncontrolled will." 352 U.S. at pp. 341, 342, 1 L.Ed. 2d at p. 386.

"I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every state of the proceedings against him. . . . The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination." 352 U.S. at p. 344, 1 L.Ed. 2d at p. 387.

It has been argued in the present cause that petitioner is not entitled to relief because, while it is admitted that his attorney attempted to confer with him, only his own testimony supports the contention that he asked to see his attorney.

This, it is submitted, is dodging the issue in the case. It is undisputed that both petitioner (R. 23) and his family (R. 28) retained Mr. Palmieri to represent him in whatever matter the police were investigating. The only inference that can be drawn when a person retains counsel is that he wants counsel to do whatever is necessary and proper to protect his client's interests.

"In our judgment, however, it is immaterial whether the client seeks his attorney or the attorney seeks the client. If the relationship of client and attorney actually exists, it is the duty of diligent counsel to seek a conference in order to consult as to steps to be taken

> in the proceedings. Surely an attorney is unfaithful to his trust if he does not, when in his judgment the occasion requires it, endeavor to confer with his client for the purpose of planning his case. Surely, also, the right to consult with one's attorney includes the right to have a conference, which is sought not by the client, but by the attorney himself. Hence this objection on behalf of the warden is overruled." *Thomas* v. *Mills*, 117 Ohio St. 114, 157 N.E. 488 at p. 489 (Sup. Ct. 1927).

It is respectfully submitted that not only compelling considerations of justice but also the decisions of this Court support petitioner's claim that he was denied due process of law when his attorney was prevented from consulting with him in the Newark police station.

Point II

Refusal of the State to Permit Petitioner's Attorney to Inspect the Confession Constituted a Further Element of Unfairness, Vitiating the State Proceedings.

In the present case not only did the State officials bar petitioner from his attorney until after police confinement and interrogation resulted in a confession, but they also refused to permit the attorney to see the confession, a document which required an hour or more of Detective Meagher's time to write out in longhand (R. 73, 105).*

Prior to the time for trial petitioner's attorney moved for an order directing the Prosecutor to produce the confession (along with those of petitioner's co-defendants) for

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* Cicenia's recollection was that about an hour was devoted to writing out the statement (P. Ex. 1, R. 33; R. 73). Detective Meagher estimated that it took him nearly three hours to write down the statement (R. 105).

inspection and for an order suppressing petitioner's confession (R. 22). The Supreme Court of New Jersey upheld the denial of both motions, stating that a defendant does not have an absolute right to inspect his confession before trial, the right being discretionary with the trial court, and stating that the trial court does not have the right to suppress a confession, *State* v. *Cicenia*, 6 N.J. 296, 78 A.2d 568 (Sup. Ct. 1951).

In a later case in which a trial court exercised its discretion to permit a defendant to examine his confession, the New Jersey Supreme Court, in a 4 to 3 decision, held that such discretion was abused and that the accused should not be permitted to make such examination, *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881 (Sup. Ct. 1953).

The dissenting opinion in the *Tune* case, which deplored the unfairness of the decision, bears upon the issues of the present matter:

> "This accused's confession, as indeed is true virtually of all confessions, was the product of *ex parte* discovery in a form which would never be tolerated in a civil cause. The accused was without counsel, denied even the comfort of the presence of a friendly face, in 'conversations' in the small hours of the morning with a sizeable group of police officers, the document not even of his composition but the 'narrative' put down and composed by Lieutenant Neidorf. Under such circumstances the State could and did, at its leisure and without hindrance or interruption, since none was there in the interest of the accused, persist until there was drained from him everything necessary to support the charge against him, and that the State prizes the result for that reason is manifest from the tenacity with which defense counsels' effort to see it is resisted." 13 N.J. at p. 232, 98 A.2d at p. 896.

> "What counsel sought was the opportunity to do what the State did when the trail was fresh, namely, seek corroboration or lack of it from external facts through avenues of inquiry opened by the confession. By pitching part of its argument upon the voluntariness of the confession, the majority ignores the true significance of the purpose of counsels' application, that is, to be in a position at the trial to meet the issue of the confession's credibility or the completeness of the tale it tells." 13 N.J. at p. 234, 98 A.2d at p. 897.

In one state it has been held that refusal to give the defense a copy of a confession is per se a violation of due process, *State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273 (Sup. Ct. 1945). The federal courts have not yet gone quite so far.

> E.g., *Leland* v. *Oregon*, 343 U.S. 790, 96 L.Ed. 1302 (1952);
>
> *In re John Henry Tune*, 230 F.2d 883 (3d Cir. 1955), *cert. denied*, 351 U.S. 987, 100 L.Ed. 1500 (1956).

It is submitted, however, that the time has come to review the rule denying a defendant the opportunity to examine his own statement made during preliminary police interrogation. The prevailing practice has been subjected to scathing criticism.

The law review discussions of the majority opinion in the *Tune* case are unanimous in condemning it.

> *Pre-Trial Discovery of Criminal Defendant's Confession*, 53 Col. L.Rev. 1161 (1953);
>
> *Defendant's Right to Inspect Statements and Confession Before Trial*, 38 Minn. L.Rev. 397 (1954);
>
> *Discovery of Defendant's Confession*, 29 N. Y. U. L.Rev. 1140 (1954);

Pre-Trial Inspection of Confession, 8 Rut. L.Rev. 407 (1954);

Request of Defendant for Pretrial Inspection of Confession Held Denied When He Failed to Show Justice Required Such Discovery, 39 Va. L.Rev. 976 (1953).

A New Jersey law professor added his voice to the chorus denouncing the prevailing New Jersey practice.

"The New Jersey rules require a hearing without unnecessary delay after an arrest. At this hearing the arrested person must be given an opportunity to employ counsel and, in some instances, is released, either because of lack of probable cause or upon bail. It would appear that this rule is more violated than honored.

"The only rational inference to be derived from failure to observe the rule is that the police are consolidating their case. This does not imply that physical violence in all, or even most, cases is being utilized or that coerced confessions, within the meaning of that term as employed by the United States Supreme Court, are being extracted. It does mean, however, that the police are using methods of discovery not recognized or sanctioned by the rules.

"Contrasted to this effective method of police discovery, the defendant is denied all but the most meager forms. Although the right to examine his confession is purportedly within the trial court's discretion, apparently the only time it can be exercised in favor of the defendant is when he claims the confession was coerced. Counsel for the defendant, who may enter the case considerably after the confession was obtained, must rely upon the recollection of the accused to prepare his defense. One cannot but share Judge Waugh's concern as he reluctantly refused inspection of a con-

fession in English which was signed by the accused who spoke, wrote, and understood only Spanish." Knowlton, *Criminal Law and Procedure*, 11 Rut. L. Rev. 71, at pp. 72-74 (1956).

The basic injustice and unreasonableness of denying to a defendant the right to examine his confession before trial is described in the Franks' book, *Not Guilty, supra.*

> "The majority of American lawyers now welcome 'discovery' in non-criminal cases. Strangely, however, most American courts grant little or no 'discovery' to defendants in criminal cases. There the theory of a trial as a fight or game still prevails, and with it the right to use strategic surprise. Yet one would think that, since life or liberty is at stake, we would be more generous in helping the accused in a criminal case to defend himself than the defendant in a non-criminal case who stands to lose only money.
>
> "It should much disturb us that, except in the U.S.A., today in every civilized land the accused, in advance of trial, is informed of the evidence the government will present against him.
>
> "In England and Canada, before an accused is put on trial, there has to be a preliminary court hearing at which the prosecution discloses all its evidence. The suspect hears the testimony of all the government's witnesses and has the right to cross-examine them, and he also sees all the documents the government proposes to use." at pp. 243, 244.

Even if this Court is unwilling to hold that refusal to grant a defendant the opportunity to examine his confession is per se a violation of due process, the additional facts in the instant case require such a holding in this matter.

In the present case the refusal of the State to permit defense counsel to inspect the confession, and, in fact, the refusal of the State Court to suppress the confession, must be viewed in connection with the undisputed circumstances under which the confession was obtained, the refusal to permit petitioner to consult his attorney during the period of interrogation which led up to the signing of the confession, and the importance of the statement in connection with the plea which petitioner entered.

Viewed together with those circumstances, denial to defense counsel of an opportunity to inspect the confession violated petitioner's constitutional rights in two ways: (1) It was highly prejudicial in that it sealed off an opportunity of partially undoing the damage already wrought by the refusal to permit petitioner to consult with his attorney. (2) It, together with that refusal to permit petitioner to consult with his attorney during the period of interrogation, constituted a denial to petitioner of his right to have effective counsel.

Point III

Petitioner Did Not Waive His Right to Redress by Pleading Non Vult.

Petitioner was sentenced to imprisonment after he had pleaded *non vult* to the crime with which he was charged rather than as a result of conviction after trial. That fact, however, does not bar petitioner from instituting this proceeding.

It is readily apparent that petitioner's plea was induced by the very existence of the confession which was obtained from him during the period he was denied the opportunity of seeing his attorney. At the time of sentencing the assistant prosecutor emphasized that the only evidence that

the State had against petitioner was his confession and the confessions of two others similarly accused.

The inducement to plead was succinctly stated by the District Court in its opinion in this cause:

> "To put it another way, when an accused voluntarily pleads guilty or non vult after rendering a confession to the police there is very little ground left upon which to postulate a factual finding that the plea was 'based' on the confession if the law affords no extraordinary encouragement to make the plea rather than to stand trial on the merits. But in capital cases in New Jersey there is an extraordinary encouragement to the accused to offer a plea of non vult if the court will accept it, and that encouragement is, of course, the death sentence that will result if on the trial the jury fails to recommend the lesser punishment of life imprisonment" (R. 15).

The fact that the instant matter involves a capital case renders inapplicable the case of *In re Domako*, 20 N.J. Super. 314, 90 A.2d 30 (App. Div. 1952), a non-capital case which suggests that by pleading guilty a defendant waives the right to attack a confession obtained by coercion. For the same reason *Trowbridge* v. *Pennsylvania*, 112 F.Supp. 356 (W.D. Penna. 1952), *affirmed*, 204 F.2d 689 (3d Cir. 1953), is inapplicable to the present case, as are the remarks of the Court in *Townsend* v. *Burke*, 334 U.S. 736, 92 L.Ed. 1690 (1948) insofar as they relate to the petitioner's claim of unlawful detention.

In any event, it has recently been held by the United States Supreme Court that a conviction following either a trial or a plea of guilty based upon a confession extorted by violence or by mental coercion is invalid under the Four-

teenth Amendment, *Pennsylvania* v. *Claudy*, 350 U.S. 116, 100 L.Ed. 126 (1956).

In that case the petition alleged that petitioner, who was 21 years old, was arrested and held incommunicado for three days. After 72 hours of intermittent questioning he confessed and was then taken before a justice of the peace. A month later he was taken before the Court of Common Pleas and charged with 30 offenses. He was not represented by counsel. The record of the proceedings showed that the petitioner told the judge that he was guilty and said "I throw myself at the mercy of the court, your honor." He pleaded guilty.

In spite of the guilty plea, the Supreme Court held that the charges in the petition as to the events which transpired, which included the obtaining of the confession, required a hearing as to their truth.

> "Our prior decisions have established that: (1) a conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause; . . . " U.S. at p. 118, L.Ed. at pp. 129, 130. (Italics supplied.)
>
> "It is entirely possible that petitioner's prior confession caused him, in the absence of counsel, to enter the guilty plea." U.S. at p. 122, L.Ed. at p. 132.

The *Claudy* case involved proceedings tainted by a coerced confession. Its principles, however, are equally applicable to the present case wherein petitioner was deprived of a different constitutional right—i.e., effective assistance of counsel. Those principles support the proposition that petitioner's plea of *nolo contendere* under the circumstances of this case does not bar him from seeking relief, by way of his present action.

CONCLUSION

In view of all of the facts in this case (including petitioner's age and background; his confinement incommunicado for a long period without arraignment during which period law enforcement officers obtained his signature to a statement; the refusal to permit petitioner to consult with counsel during such period in spite of repeated requests for such consultation; the refusal to permit petitioner's counsel to inspect the statement so obtained; and the importance of the statement in relation to petitioner's plea of *non vult*, it is urged that the decision of the court below be reversed and that petitioner's application for a writ of habeas corpus be granted.

Respectfully submitted,

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Office - Supreme Court, U.S.
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

DOCKET NO. [redacted] 177

VINCENT CICENIA,
Petitioner-Appellant,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm at Rahway, New Jersey,
Respondent-Appellee.

BRIEF OF RESPONDENT STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Docket No.

VINCENT CICENIA,

Petitioner-Appellant,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm, at Rahway, New Jersey,

Respondent-Appellee.

BRIEF OF RESPONDENT STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Official Reports of Opinions Delivered in the Courts Below.

The opinion of the United States Circuit Court of Appeals, Third Circuit, the Court immediately below and here under review is not officially reported. (See petitioner's Appendix, Exhibit B, page 30.)

The opinion of the United States District Court, District of New Jersey (Hon. Phillip Forman) is also not officially reported. (See petitioner's Appendix, Exhibit A, page 23.)

The opinion of the Supreme Court of New Jersey holding that petitioner did not have an absolute right to a pretrial inspection of his confession is officially reported in 6 N. J. 296, 78 A. 2d 568, which modified the holding of the New Jersey Superior Court, Appellate Division, reported in 9 N. J. Super. 135, 75 A. 2d 476.

II.

Counter-statement Concerning Jurisdiction.

Petitioner states in his petition, without elaboration, that the jurisdiction of this Court is being invoked under 28 U. S. C., sec. 1254(1) (petition, p. 1).

We respectfully submit that the judgment of the Court of Appeals, the court immediately below, as well as the judgments of the courts of New Jersey involving the constitutional questions herein presented, are in strict conformity with the provisions of the Federal Constitution respecting due process and equal protection of the laws as guaranteed by the United States Constitution(1), and that the Court below did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction but should deny issuance of a writ of certiorari.

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(1) Constitution of the United States, Amendment XIV, Section 1.

III.

Counter-statement of the Case.

Vincent Cicenia, the petitioner herein, is applying to this Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals, Third Circuit, entered January 7, 1957, which affirmed the judgment of the United States District Court, District of New Jersey, denying petitioner's application for a writ of habeas corpus, entered July 17, 1956.

Following is a brief summary of the antecedent events and proceedings in the case.

On March 17, 1947, at about 8:30 P. M., at Newark, one Charles Kittuah was shot and killed in his small dry-goods store during the perpetration of an armed robbery. There were no eye-witnesses to the killing; the perpetrators escaped immediately after the crime; and the crime remained unsolved until December 1949. Solution of the crime came about in this manner.

The petitioner Vincent Cicenia, and two others, Armando Corvino and John DeMasi, were residents of the City of Orange, a suburb of Newark. As a result of information furnished the Orange Police by Corvino's wife, Corvino and DeMasi were taken into custody and questioned by the Newark police. Corvino and DeMasi immediately admitted their participation in the crime, and they implicated this petitioner Cicenia.

On the morning of December 18, 1949, in response to a call from the Orange police, petitioner went to Orange

police headquarters where he was immediately taken into custody and turned over to the Newark police for questioning and investigation.

On the afternoon of the same day, while the investigation by the Newark police was in progress, at about 2:00 P. M., Mr. Frank A Palmieri, an attorney, appeared at Newark police headquarters and requested to see the petitioner, stating he had been retained by petitioner's family to represent him.

The attorney was informed that the police and State prosecuting officials were then engaged in questioning the petitioner as well as the other two, Corvino and DeMasi, and that as soon as the investigation was completed the attorney would be permitted to see and consult with his client.

The investigation was concluded at about 9:00 P. M. and the above-named attorney was immediately permitted to consult with his client, the above-named petitioner.

The following morning, December 19, at about 11:00 A. M., all three of the accused, including this petitioner, were properly arraigned in the Magistrate's Court where they were formally charged with the crime of murder. At the arraignment, petitioner was represented by the above-named attorney; all three defendants were properly advised of their rights pursuant to the pertinent New Jersey Rules of practice and procedure; and they were remanded to the county jail without bail to await action by the Grand Jury.

The Essex County Grand Jury (1949 term) returned an indictment against the three defendants charging that

they "did wilfully, feloniously and of their malice aforethought kill and murder Charles Kittuah," etc.

Before trial of the indictment, on March 3, 1950, counsel for petitioner, said Mr. Palmieri, presented a motion before the county judge, the late Hon. Joseph E. Conlon, requesting a pre-trial inspection and suppression of petitioner's written confession upon the ground the petitioner's attorney had been denied permission to see and consult with his client during the police questioning and investigation of the crime on the afternoon of December 18, as hereinbefore referred to. Petitioner's motion for a pre-trial inspection and suppression of his written confession was denied by the trial judge.

Petitioner's appeal from the trial judge's denial of the above motion was dismissed by the New Jersey Superior Court, Appellate Division. (See *State* v. *Cicenia*, 9 N. J. Super. 135, 75 A. 2d 476).

On appeal to the New Jersey Supreme Court, the judgment of the Appellate Division was affirmed with modification, and it was held that a defendant does not have the absolute right to a pre-trial inspection of his written confession or those of his co-defendants. (See *State* v. *Cicenia*, 6 N. J. 296, 78 A. 2d 568.)

On March 26, 1951, the date fixed for trial of the indictment, all three defendants, represented by their individual counsel, offered their pleas of non vult to the indictment. The pleas were consented to by the prosecuting attorney and accepted by the court.

On April 18, 1951, the three defendants, also represented by their individual counsel, were sentenced to life

imprisonment. (The proceedings at the time of the pleas and at the time of sentence were submitted and received by the United States District Court by stipulation between counsel on both sides at the hearing on application for a writ of habeas corpus.)

In December, 1953, while petitioner and his co-defendants were serving their sentence, petitioner filed a petition in the Essex County Court for a writ of habeas corpus wherein he claimed that: (a) his arrest was an unlawful one; (b) there was an unreasonable delay in his arraignment; and (c) *he had been denied counsel* between the time of his arrest and arraignment (which was one of his grounds in his habeas corpus proceedings in the United States District Court and again in his appeal before the Court below).

The Essex County Court granted to petitioner a writ of habeas corpus and petitioner was granted a plenary hearing in that court on January 21, 1955. At the conclusion of the hearing the court discharged the writ, holding that petitioner's claims were without merit. (These proceedings were likewise submitted to the United States District Court by stipulation at the hearing on the habeas corpus proceedings.)

On appeal, the Superior Court of New Jersey, Appellate Division, affirmed the County Court's dismissal of the writ of habeas corpus. The affirmance was dated July 11, 1955, but was not officially reported. (The court's opinion was also submitted by stipulation to the United States District at the hearing in that court.)

Petitioner thereafter moved before the Supreme Court of New Jersey for leave to appeal from the judgment of the Appellate Division as an indigent, and his motion was denied on September 12, 1955. (Also submitted as part of the record before the United States District Court.)

Petitioner thereafter applied to this Court for a writ of certiorari to review the New Jersey Supreme Court's denial, and this Court denied certiorari on December 12, 1955. (See *Vincent Cicenia* vs. *State of New Jersey*, 350 U. S. 925, 76 S. Ct. 215.)

Petitioner thereafter sought redress in the Federal courts by applying to the District Court for a writ of habeas corpus substantially upon the same grounds he had advanced in the State courts; namely, that his arrest and detention for slightly in excess of 24 hours, during a portion of which he was subjected to police questioning, was unlawful; that during the course of the police questioning he gave an involuntary written confession which his counsel was prohibited from inspecting before trial; and that these circumstances allegedly constituted a denial of due process of law.

In his Brief petitioner discusses several points which we shall argue in the order presented.

IV.

Summary of the Argument.

We respectfully submit:

One. Petitioner's confession was not extorted nor obtained by means of fundamental unfairness, but it was given voluntarily; since petitioner entered a plea of non vult to the indictment the confession was not used against him at any stage of the proceedings; and the plea of non vult was given voluntarily and understandingly in the presence of and upon the advice and consent of his attorney.

Two. In conformity with New Jersey law that an accused is entitled to the aid and assistance of counsel for his defense at the trial, petitioner was not denied any constitutional right to counsel while he was being questioned during the police investigation of the crime, especially where petitioner was afforded counsel immediately upon completion of the police investigation and from thenceforth throughout every step of the criminal proceedings.

Three. The refusal of the State courts to permit petitioner's attorney to inspect the confession before trial was in accordance with New Jersey law, and such refusal cannot be said to have contributed to any alleged "unfairness" in the proceedings.

V.

ARGUMENT.

POINT ONE.

Petitioner's confession was not extorted nor obtained by means of fundamental unfairness, but it was given voluntarily; since petitioner entered a plea of non vult to the indictment the confession was not used against him at any stage of the proceedings; and the plea of non vult was given voluntarily and understandingly in the presence of and upon the advice and consent of his attorney.

The gist of petitioner's argument under his Point I seems to be, in brief, that his confession was an involuntary one and had been extorted from him by the police; that the confession was taken from him during the time his attorney was refused permission to see and consult with him; and that the existence of his confession induced him to enter his plea of non vult.

With this we cannot agree.

It is the State's contention, briefly, that:

(a) Petitioner's confession was not extorted from him, as he claims, but it was given voluntarily in accordance with the requirements of New Jersey Law and in strict compliance with "fundamental fairness essential to the very concept of justice."

(b) Petitioner's attorney was not permitted to consult with petitioner during the taking of the confession because, under New Jersey law, an accused is entitled to the aid and assistance of counsel *at the trial* and not while the police are investigating the crime during the period between the accused's arrest and arraignment. In the instant case, petitioner was taken into police custody on the morning of December 18; his counsel was permitted to see and consult with him immediately upon the completion of the police investigation on the evening of the same day; petitioner was represented by counsel of his own choosing the following morning upon his arraignment before the Magistrate; and thereafter he was represented by counsel throughout the entire criminal proceedings until the imposition of sentence.

(c) Petitioner's confession was never used against him at any stage of the proceedings, because he entered a plea of non vult to the indictment in the presence of his counsel and upon the advice and consent of his counsel, and the plea was offered voluntarily and understandingly. (It is to be noted that the confession was taken on December 18, 1949, and the plea was offered on March 26, 1951, after a lapse of 15 months.)

(d) The refusal of the State courts to allow to petitioner a pre-trial inspection of his confession was in conformity with the established law of New Jersey, and it cannot be considered as any important factor in the totality of circumstances claimed by petitioner to have resulted in any denial of due process of law.

(a)

Petitioner's confession was given voluntarily, and in accordance with "fundamental fairness essential to the very concept of justice."

At the hearing in the District Court, in the habeas corpus proceeding, petitioner testified that on December 18, 1949, after he was turned over to the Newark police by the Orange police, he was questioned in Newark police headquarters; that he was removed back and forth several times between his detention cell and the interrogation room; that he was given nothing to eat; that during the course of the questioning "they were hitting me and they started beating me;" that "if I didn't agree to sign a statement that was being prepared by Detective George Meagher that I would never be able to go home again or see my parents or consult or be able to call or see my lawyer," (T-20)(2); that "They slapped me around and hit me in my back, side and rib section," (T-24); and that he signed the confession "against my will," (T-26).

The State specifically and directly contradicted each and every statement of petitioner with regard to his alleged police mistreatment.

Detective-Lieutenant Joseph A. Kinney of the Newark Homicide Squad testified that petitioner was given food "around 1 o'clock," (T-63); and that petitioner had not been subjected to any abuse or threats or physical violence, (T-64, 69).

Prosecutor's Detective George E. Meagher, a member of the prosecutor's staff for more than 27 years, testified

(2) References are to the testimony in the Transcript of the proceedings before Hon. Phillip Forman, Judge of the U. S. District Court.

that petitioner first gave him a detailed oral account of the crime and the part played by each of the three participants, (T-75 to 78); that there were no threats or violence shown the petitioner nor any promise of reward made to him, (T-80); that the petitioner gave the information and Detective Meagher prepared in handwriting the 7-page confession, and it took from 5:17 P. M. to about 8:10 P. M. to write the confession; that thereafter Detective Meagher read the confession aloud to petitioner and petitioner himself read it aloud; that petitioner signed each and every one of the seven pages of the confession; that thereafter a disinterested citizen-witness named Taylor questioned the petitioner in regard to police treatment and petitioner acknowledged that he had been treated properly (T-80 to 87).

Assistant Prosecutor Maurice J. McKeown and Detective Carlton B. Norris, who were present during the questioning, also testified to every detail in connection with the taking of the confession and they verified that the confession was given voluntarily and in conformity with every standard of fairness.

It is established in New Jersey that before a confession may be admitted in evidence it must be proven to have been given freely and voluntarily and not induced by fear or hope or other considerations leading to the substitution of something else than the truth. (*State* v. *Rios*, 17 N. J. 572, 599-601, S. C. 1955; *State* v. *Walker*, 15 N. J. 485, S. C. 1954; *State V. Grillo*, 11 N. J. 173 S. C. 1952; *State* v. *Cole*, 136 N. J. L. 606, E. & A. 1948).

In the instant case, the confession was taken not only in accord with the New Jersey rule of admissibility on the

basis of voluntariness, but the methods used were in strict conformity with the constitutional requirements of "fundamental fairness essential to the very concept of justice," under the Fourteenth Amendment to the Federal Constitution. (Cf. *Watts* v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1801, 1949; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. Ed. 1440, 1949; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. Ed. 1810, 1949).

Here there was none of the continuous, prolonged questioning and grilling by relays of officers under conditions and circumstances determined by this Court in the *Watts*, *Harris* and *Turner* cases, *supra*, to be improper and oppressive and making the resulting confessions in those cases inadmissible and violative of the rule of "fundamental fairness."

The only police officials and officers who undertook the investigation and questioning of not only this petitioner but of his two confederates were an assistant prosecutor (McKeown), a prosecutor's detective (Meagher) and two detective-members of the local homicide squad (Kinney and Norris).

The record does not support petitioner's contention of police brutality. The evidence of petitioner was vigorously and abundantly contradicted by the above State witnesses who testified that petioner was not subjected to any threats of force or actual violence, or that there was any physical condition causing any discomfiture to him.

(b)

Petitioner pleaded non vult to the indictment and use of the confession was thereby dispensed with; and the confession cannot now be subject to attack by means of habeas corpus.

As we have pointed out under subdivision (a) of this Point, it was established by the State at the hearing on the writ in the District Court by the greater weight of the evidence that petitioner's confession was given freely and voluntarily and that it was procured by means consistent with constitutional standards of "fundamental fairness."

If petitioner had gone to trial he could have attacked the legality of his confession and the State would have been required to establish its voluntariness as a prerequisite to its admissibility in accordance with State law and that it was procured by means consonant with due process.

However, petitioner chose not to go to trial and some 15 months after the taking of the confession he entered a plea of non vult to the indictment in open court in the presence of and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, in view of petitioner's plea of non vult, there was no longer any need for use of the confession and the trial judge acquired the necessary jurisdiction to impose an appropriate sentence.

We respectfully submit, too, that under such circumstances the petitioner could not thereafter make any proper and legitimate attack upon his confession by way of habeas corpus proceedings.

In the case of *In re Domako*, 20 N. J. Super. 314, 90 A. 2d 30 (N. J. App. Div. 1952), aff'd 11 N. J. 591, 95 A. 2d 505 (N. J. S. C. 1953), the defendant pleaded guilty to four indictments and was given a prison sentence. Thereafter he applied for habeas corpus, claiming, as one of his grounds, his unlawful detention for seven days following his arrest and before he was arraigned; that during the detention he was subjected to continued questioning and physical force which led to the giving of his confession. His contention was rejected because *"he pleaded guilty and if confessions were made by him, no use was ever made thereof,"* (p. 316 of 20 N. J. Super.), and that under such circumstances the defendant could not invoke the rule that in order to be admissible the confession must be shown to have been voluntarily given.

A Federal case in point is *Trowbridge* v. *Pennsylvania*, 112 F. Supp. 356 (D. C. 1952), aff'd 204 F. 2d 689 (3d Circ. 1953). There the defendant pleaded guilty to two counts of a 3-count indictment. On habeas corpus, he claimed that, (1) he had been severely beaten by the police and forced to sign a confession; and (2) he had been "tricked" by his attorney into offering a guilty plea. His contentions were rejected because he failed to sustain his claim of denial of constitutional rights in the habeas corpus proceedings in the State courts, and the record clearly supported the State courts' conclusion that there had been no denial of his constitutional rights. The Federal court particularly emphasized the point that because of his pleas his confession had not been used against him when it stated (p. 357 of 112 F. Supp.):

> "But even if petitioner had been beaten to extract the confession, he would not be entitled to the writ,

for *the confession was not used against him . . .*" (emphasis supplied).

The court considered of significance the period of time that elapsed from the time he gave his confession to the time he entered his pleas, as follows (p. of 112 F. Supp.):

> ". . . Also petitioner alleges that he was beaten on April 21, 1951. He was sentenced on June 25, 1951 which is over two months after the alleged beating. Thus any duress which might have been used, and we do not find this to be the fact, had ceased before petitioner was taken to court to sign the plea of guilty."

This is how the Court disposed of his contention of "trickery" of his counsel (See notation No. 3):

> "The plea was signed in the presence of petitioner's counsel which further negatives the averment of duress. The allegation that petitioner's counsel tricked him into signing a plea does not raise a federal question. Even if it were true, it would not stamp the sentence as a farce and mockery of justice." (Citing cases).

This was the situation in the instant case. Petitioner was taken into custody on the morning of December 18, 1949. His confession was taken in the afternoon and early evening of the same day. The following morning, December 19, 1949, at about 11:00 A. M., he was taken before the Magistrate for arraignment on the criminal complaint. At the arraignment he was represented by his counsel and a plea of not guilty entered. It was not until March 26, 1951, more than 15 months after the confession, after his counsel had unsuccesfully undertaken various appeals in the State

courts from the trial judge's denial of his request for a pre-trial inspection of his confession, that petitioner retracted his plea of not guilty and substituted a non vult plea to the indictment which was done in the presence of, and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, there was abundant time afforded to petitioner to reflect and understand the nature and consequences of his plea, and that he should not thereafter be permitted to attack the legality of his confession, which was never used against him, by means of habeas corpus proceedings.

U. S. ex rel. Brink v. *Claudy*, 96 F. Supp. 220 (D. C. Pa. 1951), aff'd 194 F. 2d 535, rehearing denied 102 F. Supp. 802, aff'd 200 F. 2d 699, cert. den. sub nomine *Brink* v. *Pennsylvania*, 345 U. S. 930, 73 S. Ct. 792 is a good case in point. There the defendant was arrested without warrant, placed in a cell and held incommunicado and brutally beaten for the purpose of obtaining his confession. It was held that issuance of a writ of habeas corpus was not justified "*where no confession had been received or offered in evidence.*" Cases of similar import are *U. S.* v. *Gallagher*, 183 F. 2d 342; *U. S.* v. *Payne*, 183 F. 2d 415, cert. den. 340 U. S. 913, 71 S. Ct. 283; *Holly* v. *Pennsylvania*, 81 F. Supp. 861, aff'd 174 F. 2d 480; *Waley* v. *Johnston*, 139 F. 2d 117, cert. den. 321 U. S. 779, 64 S. Ct. 617, rehear. den. 321 U. S. 804, 64 S. Ct. 845.

The facts and circumstances of *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 76 S. Ct. 223 (1956), upon which petitioner strongly relies (B. p. 8), are so strikingly at odds with those in the instant case that the case cannot serve as any advantage to petitioner. There the defendant

had never had the benefit of counsel at any stage of the proceedings; he was without counsel upon his arraignment, and he was without counsel when he entered his guilty pleas to 30 charges. Further, the prosecuting attorney subjected him to great pressure by demanding that petitioner "sign your name (to the pleas) and forget it." It is most significant, too, that all of petitioner's allegations contained in his petition were *undisputed* by the State.

That is not the situation here. If petitioner had gone to trial and there attempted to attack the legality of his confession the State would have been prepared to show that the confession was given freely and voluntarily and by means of fundamental fairness. But petitioner avoided a trial by pleading non vult and the confession was never used against him.

At no time did petitioner make any attempt to attack his confession in the State courts. It was not until he instituted habeas corpus proceedings in the Federal District Court that he made an attack upon his confession by claiming it had been extorted by the police. And at the hearing in the District Court the State vigorously disputed his claim by submitting abundant evidence of all of the police officers and prosecuting officials involved to show that the confession was freely and voluntarily given and that it was procured by fundamentally fair means.

In contrast with the *Herman* v. *Claudy* case, *supra*, the petitioner in the instant case had the benefit of counsel from the evening of December 18, 1949, immediately following the taking of his confession, throughout every step of the criminal proceedings until he was sentenced on April 18, 1951.

POINT TWO.

In conformity with New Jersey law that an accused is entitled to the aid and assistance of counsel for his defense at the trial, petitioner was not denied any constitutional right to counsel while he was being questioned during the police investigation of the crime, especially where petitioner was afforded counsel immediately upon completion of the police investigation and from thenceforth throughout every step of the criminal proceedings.

At the hearing in the District Court, petitioner testified in substance that on December 18, 1949, at about 8:00 A. M., in response to a police call, he voluntarily presented himself at Orange police headquarters; at about 10:00 A. M. he was taken into custody by Newark detectives and taken to Newark police headquarters where he was questioned in connection with the murder committed in Newark on March 17, 1947.

Corvino and DeMasi had already been taken into custody and they involved the petitioner as a participant in the crime.

It was testified to by Prosecutor's Detective Meagher, that at first the petitioner disclaimed any knowledge of the crime, but upon further questioning he gave the police a detailed oral admission of his participation in the murder, and he detailed the part played by each of the other two participants; and Detective Meagher further testified that later the same day he reduced petitioner's oral admissions of the details to a 7-page written confession which,

upon its completion, was read by and to petitioner and signed by him.

Petitioner stated that he was questioned intermittently; that he was taken back and forth from his cell to the interrogation room several times; and he claimed he was subjected to physical violence, stating that the alleged beatings were confined to the lower part of his body and not to the face and head; that the alleged beatings were not administered by or in the presence of Assistant-Prosecutor Maurice J. McKeown who had been present during the entire investigation and in attendance during the questioning of petitioner.

He further testified that he requested to see his lawyer, Mr. Frank A. Palmieri, but this request was refused. The said attorney did not personally testify at the hearing, but his affidavit which had been submitted to the original trial court upon petitioner's original petition for habeas corpus and which was by consent submitted to the District Court as part of the record, stated that the attorney arrived at Newark police headquarters at about 2:00 P. M. of December 18, 1949, and that about 4:30 P. M. and hourly thereafter the attorney requested of the police officer at the desk on the ground floor of Newark police headquarters, and of Assistant-Prosecutor McKeown, that he be permitted to see and consult with his client, that his requests were refused, and that he was finally permitted to see his client at about 9:30 P. M.

Prosecutor's detective Meagher testified that he arrived at police headquarters at about 12:35 P. M. but he did not commence the questioning of petitioner until "about 3:15 P. M." and the questioning continued "until

about 4:10" P. M. (T-73). During the questioning the petitioner orally admitted and gave all specific details concerning the crime and the participation of each of the men in its commission (T-75 to 79). Detective Meagher further testified that he commenced the writing of the 7-page confession "at 5:17 P. M.," that he concluded it "about 8:10 or thereabouts," and that the impartial citizen-witness (Mr. Taylor) arrived at headquarters at about 8:30 P. M. (T-80).

Assistant-Prosecutor McKeown, at the hearing, testified that he saw petitioner's attorney at police headquarters on the afternoon of December 18; he admitted that the attorney had requested to see his client; and that "I wasn't permitting him to see him until the investigation had been completed, and the investigation had not been completed." (T-96).

After the investigation was completed petitioner's attorney was allowed to see and consult with his client, which was about 9:00 P. M.

From that time on, petitioner was continually represented by his counsel throughout every step of the criminal proceedings, including the arraignment which was held the following morning, December 19, 1949, the entry of petitioner's plea of non vult on March 26, 1951, and the imposition of the sentence on April 18, 1951.

At the time of the arraignment, petitioner was advised of his rights by Magistrate, in conformity with the New Jersey Rules of Practice and Procedure, and a plea of not guilty was entered for him.

At the time of the plea of non vult, petitioner's attorney addressed the court in his behalf, and in reply to the

Assistant-Prosecutor's and the court's inquiry, petitioner gave assurance that he was entering his plea of non vult voluntarily and understandingly.

And again at the time of sentence, petitioner, in the presence of his counsel, was asked if he had any statement to make.

At no time on either of these occasions did petitioner utter a word of complaint either with respect to the manner of the taking of his confession, or that he had been refused permission to see and consult with counsel during the police investigation.

It is the established law of New Jersey that an accused's constitutional right to counsel contemplates the aid and assistance of counsel *for his defense at the trial*, and not during the period between his arrest and arraignment. (*State* v. *Grillo*, 11 N. J. 173, S. C. 1952, cert. den. sub nomine *Grillo* v. *State of New Jersey*, 345 U. S. 976, 73 S. Ct. 1123, 1953; *State* v. *Murphy*, 87 N. J. L. 515, 528-531, N. J. E & A. 1915; *State* v. *Bunk*, 4 N. J. 461, 470, N. J. E. & A. 1952, cert. den. 340 U. S. 839, 71 S. Ct. 25; *State* v. *Cole*, 136 N. J. L. 606, N. J. E. & A. 1949, cert. den. 334 U. S. 851, 68 S. Ct. 1503).

The New Jersey Supreme Court, in *State* v. *Grillo*, *supra*, said, p. 180:

> "With respect to the allegations of denial of permission to consult counsel during the police interrogation, the former Court of Error and Appeals has expressly determined this alleged constitutional question, denial of counsel during the period between arrest and arraignment and its effect on a confession obtained during that period, adversely to

the contentions here presented by the defendants, in *State* v. *Murphy*, 87 N. J. L. 515, 528-531 (E. & A. 1915). In *State* v. *Murphy*, supra, the court said:

"'The constitutional provision, whose protection is invoked, contemplates a criminal prosecution and provides for a speedy trial and public trial by an impartial jury, that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and (conjunctively) have the assistance of counsel for his defense. It clearly appears that the rights thus intended to be secured to a criminal defendant are rights arising from a criminal prosecution—that is, a trial upon indictment. A prisoner making a confession is not confronted with any witnesses, at least never in the sense that they are examined in his presence, he can have no process for witnesses in his favor upon such an occasion, and, consequently, he is not entitled to the assistance of counsel to save him from himself. That is done later by the trial court if the confession were unlawfully obtained.'

"It was held in *State* v. *Bunk*, 4 N. J. 461,.470 (1950), certiorari denied 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615 (1950) that:

"'. . . the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts, *State* v. *Murphy*, 87 N. J. L. 515 (E. & A. 1915); *State* v. *Cole*, 136 N. J. L. 606, supra. . . .'"

We cannot agree with petitioner's contention under this point that he had a "fundamental right" to the "advice and assistance of counsel" at the time of the police interrogation, and that the Court below erred in its holding that

the lack of counsel at such time did not invalidate the confession.

Careful examination of the above-cited New Jersey cases (*State* v. *Grillo*, *State* v. *Murphy*, *State* v. *Bunk*, and *State* v. *Cole*, *supra*) will disclose that New Jersey's highest court determined what was meant by the right to counsel under both the State and Federal Constitutions, and that the right to the aid and assistance of counsel under the Federal Constitution did not contemplate the right to counsel while a defendant is under arrest and at the time he gives a confession. This is what is stated in *State* v. *Murphy*, *supra*, p. 530:

> "It is to be observed that the constitution (referring to the Amendment VI of the Federal Constitution providing that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for his defence. Obviously, the word *defence*, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defence. . . . By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession* is a thing entirely apart from *defence* upon a trial. This is evidenced every day by the pleas of guilty made by criminal defendants without the assistance of counsel to advise them thereon. A plea of guilty amounts to a confession in open court."

The case of *Fikes* v. *State of Alabama*, 77 S. Ct. 281 (1957), (a portion of the dissenting opinion being quoted by petitioner, B. pp. 11-12), certainly does not support petitioner's contention under this Point that a refusal to permit a prisoner's attorney to see and consult with him while the prisoner is being investigated and questioned by the police between the time of his arrest and arraignment constitutes a denial of due process. There the defendant's conviction (burglary with intent to rape and the death sentence imposed) resulted largely from the evidence at his trial of his alleged confessions, and it was held that "the totality of the circumstances that preceded the confessions"(3), established by the State's witnesses, rendered the confessions involuntary and their use at the trial constituted a denial of due process.

The lawyer who called to see petitioner came one week after the arrest, 6 days after the questioning began, 2 days *after* petitioner gave his first confession, and 3 days *before* the second confession. Besides, there is no indication from a reading of the dissenting opinion that even if the attorney had had previous authority from petitioner or his family that it would have had any bearing upon the dissenting justices' opinion.

Contrast the facts and circumstances of the *Fikes* case with those in the instant case.

Here the petitioner was taken into custody on the morning of December 18, 1949 at about 8:00 A. M., and about

(3) Lack of education and low mentality of defendant; his arrest by civilians, lodgment in jail and subsequent removal to a state prison far from his home; questioning before the first confession for several hours' at a time over a period of five days; kept in isolation for a whole week except for intermittent sessions for questioning; failure of arraignment in violation of State law; lengthy questioning before the second confession.

two hours later he was turned over to the Newark police who took him to Newark headquarters where petitioner's two confederates were already in custody and under questioning; Prosecutor's Detective Meagher who had been assigned to interview the petitioner arrived at headquarters shortly after noon, and he did not commence questioning the petitioner until about 3:15 P. M.; his oral questioning lasted about one hour, until about 4:10 P. M., and during this questioning petitioner admitted his participation in the crime and also that of his two confederates; Detective Meagher then proceeded to take the written confession which began at about 4:10 P. M. and completed shortly after 8:00 P. M. After the impartial citizen witness (Taylor) interviewed the petitioner who acknowledged to him that he had not been mistreated by the police, at about 9:00 P. M., petitioner's attorney was permitted to see and consult with him.

It is significant that any accusation of alleged violence or threats, which petitioner made for the first time at the hearing on habeas corpus before the District Court but which he had never complained of theretofore in any proceeding in the State courts, was specifically and vigorously denied by all of the State witnesses at the hearing (testimony of Prosecutor's Detective Meagher, Detectives Kinney and Norris of Newark police headquarters, and of Assistant Prosecutor McKeown).

It is of significance, also, that petitioner's confession which he attacked in the Federal Court hearing, had never been used against petitioner since he entered a plea of non vult; and there never was any trial in which the State would have been prepared to show its voluntariness.

As to petitioner's complaint that his attorney was not permitted to see him while he was under investigation and questioning in Newark headquarters, the attorney was permitted to see him immediately after the completion of the police investigation; the same attorney represented him the following morning at the arraignment before the Magistrate; and the same attorney continued to represent him thereafter throughout every step of the proceedings down to the entry of plea of non vult on March 26, 1951 and the imposition of sentence on April 18, 1951.

Petitioner, in his Brief (pp. 10-11), cites and quotes from cases on the subject of an accused's right to counsel, with which we have no quarrel except that they have no application here.

For example, in *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 368 (B. pp. 10, 11, 16-17), the court failed to comply with defendant's request for assignment of counsel to defend him *at the trial*, and rather than go to trial without adequate legal representation the defendant entered a plea of guilty. This was held to be a denial of due process because, as the Court pointed out, while a conviction based upon a guilty plea should not be lightly impeached, such a plea to a capital offense must be given serious consideration where the defendant *asked* for counsel and could not obtain one, especially when he was incapable adequately of making his own defense.

Likewise, in *Uveges* v. *Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184 (B. p. 11), where a 17-year old defendant under four charges of burglary was never informed of his right to counsel and he was never offered counsel at any time in the entire proceedings. He succumbed to the prosecuting

attorney's direction to plead guilty upon the understanding that he would receive a Reformatory sentence but instead he was sentenced to 20 to 40 years in the Penitentiary. This was unquestionably a denial of due process.

Hawk v. *Olson*, 326 U. S. 271, 66 S. Ct. 116 (B. p. 11), was another case of denial of due process which cannot be compared with the instant case. There the defendant was taken from Kansas to Nebraska, held incommunicado in jail where he was visited for 15 minutes by the Public Defender and his assistant who tried to intimidate him into pleading guilty, after which they left the defendant saying they would have nothing to do with his trial; the following morning defendant was arraigned on a charge of murder and he pleaded guilty without any counsel; defendant requested a 24-hour adjournment of trial in order to consult with counsel and prepare his defense which was refused; his trial commenced without counsel and after two or three jurors were impaneled the Public Defender and his assistant stepped forward and entered the case; they never consulted with defendant before trial, and the court never assigned any counsel to represent the defendant; and after the jury was selected there was a recess of the trial until the following morning.

In *White* v. *Ragen*, 324 U. S. 760, 65 S. Ct. 978 (B. p. 11), the court-appointed counsel failed to confer with defendant until the case was called for trial when counsel told defendant he would do nothing for him unless he had some money; when defendant asked counsel to call a certain witness in his behalf, counsel said he "did not have the time" as he had a case in another court; counsel demanded that defendant plead guilty as the court would not grant a con-

tinuance; and when defendant requested a continuance the judge told him to "keep still ' as the attorney would do all the talking for him; and finally the defendant in despair entered a plea of guilty. This was held to be a denial of due process because of a lack of "effective counsel."

In *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55 (B. p. 11); defendants were arraigned immediately upon return of the indictment and they pleaded not guilty. In response to their request for counsel, the judge appointed "all the members of the bar" thereby anticipating that some members of the bar would come forward to aid the defendants, but none did so; and defendants were not given any reasonable opportunity to communicate with their families and endeavor through them to obtain counsel. It was held that the attempted designation of counsel was so indefinite and so close upon trial as to amount to a denial of "effective" and substantial aid and assistance of counsel within the meaning of due process.

Canizio v. *New York,* 327 U. S. 82, 66 S. Ct. 452, cited and quoted from (B. p. 13), would seem to support respondent's contention. There a 19-year old defendant pleaded guilty to robbery, and he claimed that at the time of plea he was not represented by counsel and was not advised of his right thereto. The State showed that an attorney had filed a "notice of appearance" in defendant's behalf two days before the sentence. It was held that, "even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally;" that petitioner "actually had the benefit of counsel;" and when counsel took over the deefnse "he could have raised

the question of a defect in the earlier part of the proceedings," (p. 453, bottom, to p. 454 of 66 S. Ct.)

In *Stroble* v. *California,* 343 U. S. 154, 72 S. Ct. 599 (1952), quoted from by petitioner (B. p. 13), the defendant was being examined in the district attorney's office in connection with the murder for almost an hour when an attorney who said he had been sent by defendant's son-in-law made a request to inquire of defendant personally as to his guilt of the crime and report it back to the son-in-law; and the attorney's request was refused. It was held that the refusal did not constitute a deprivation of due process "*either independently or in conjunction with all other circumstances in the case,*" such as, that defendant's examination was made in the presence of some nineteen persons connected with the district attorney's office and police department; that the district attorney inspired certain inflammatory newspaper reports prior to the trial; that defendant was without counsel at a sanity hearing; and an unwarranted delay in defendant's arraignment.

The facts and circumstances in *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Circ. 1955), cert. den. 350 U. S. 896, are vastly different from those in the instant case. There the defendant was arrested on Sunday, May 11, 1941, at 6:00 P. M. and five or six officers questioned him from 9:00 P. M. until 2:00 A. M. the following morning, a period of 5 hours; he was then placed in a cell; given no bed, spring or mattress, and blankets, but only a wooden bench; his questioning was resumed at 10:00 A. M. the next morning and continued all day; members of his family, a friend, and an attorney who called at the station house "tried to get information concerning his whereabouts," but they were

given no information and defendant was kept incommunicado; no one was permitted to see him until his arraignment which took place 40 hours after his arrest; two women and a man, who were detectives in disguise, saw the defendant on May 12th ostensibly to identify him as the person they had seen at the wheel of the get-away car at the time of the stickup and shooting, whereas they were not witnesses at all and defendant was not told that they were detectives; defendant signed confessions at about 9:00 P. M. of May 12th (27 hours after his arrest); and he was not arraigned until late the following day, May 13th. Furthermore, *the above facts were not disputed by the State;* and there was ample opportunity to arraign the defendant much sooner because under New York law a City Court was required to be open "every day" including Sundays and a Magistrate is always available. Under the facts and circumstances of that case there was clearly a denial of due process, which was not the situation in the instant case.

Here it cannot be said that the interrogation was unduly "protracted" or unreasonably "prolonged." On Sunday morning, December 18, 1949, at about 10:00 A. M., defendant was taken from Orange to Newark police headquarters (a distance of 4 or 5 miles) and placed in a cell. Prosecutor's Detective Meagher arrived at about 12:45 P. M. and he began the questioning of petitioner at "about 3:15 P. M.," (T. p. 73) and continued "until about 4:10" (about 1 hour); Detective Meagher commenced the writing of the confession "at 5:17 P. M.," and he completed it at "about 8:10 or thereabouts;" the impartial citizen witness (Taylor) "arrived in the neighborhood of 8:30," and after he questioned petitioner about police treatment and peti-

tioner acknowledged he had been well treated, his attorney was permitted to see and consult with him.

The entire police investigation, including petitioner's questioning and the taking of his written confession, did not exceed a period of five to six hours.

Petitioner's attorney, who was not permitted to see the defendant in the afternoon while defendant was under questioning and investigation, was permitted to see and consult with his client in the neighborhood of 9:00 P. M., and from that moment on the attorney was available to him continually and at every step of the criminal proceedings until the close of the case.

The attorney was present when petitioner was arraigned the following morning at about 11:00 A. M. in the Magistrate's Court and he was advised of his rights pursuant to the requirements of the New Jersey Rules of Practice and Procedure; he was present in court on the day fixed for trial, March 26, 1951 when petitioner retracted his plea of not guilty and entered a plea of non vult, at which time petitioner acknowledged that he was entering his plea voluntarily and understandingly; and he was present in court on April 18, 1951 at the time of sentencing when the attorney made a plea for leniency.

During the time intervening between the arraignment on December 19, 1949 and the entry of the plea of non vult on March 26, 1951 (about 15 months), petitioner's counsel resorted to motions for the suppression and pre-trial inspection of petitioner's confession and the attendant appeals in the New Jersey courts to no avail.

The gist of petitioner's contention under this point seems to be, briefly, that, "upon occasion the innocent as

well as the guilty succumb to such tactics (police questioning of an accused soon after his arrest) and plead guilty to crimes they did not commit," (B. p. 17), and that, "For this reason alone assistance of counsel during police interrogation taking place after arrest and prior to arraignment is a fundamental right," (B. p. 18), with which we do not agree.

Under New Jersey law, as we have hereinbefore pointed out, the constitutional provision on assistance of counsel "contemplates a criminal prosecution" in which the defendant is entitled to have "the assistance of counsel *for his defense*," (*State* v. *Murphy, supra*); and that "the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts," (*State* v. *Bunk, supra*)

We think that the following statement of Chief Justice Vanderbilt in *State* v. *Tune*, 13 N. J. 203, 216 (1953) is a complete answer to any argument against the questioning of an accused by the police soon after arrest:

> "The confession obtained shortly after apprehension is more apt to be trustworthy since it is a spontaneous statement before the accused has had an opportunity to converse with the older habitues of the jail and others who may aid him in preparing a falsified defense, and encourage him to give perjurious testimony. Thus Dean Wigmore, in upholding the legality of continuous questioning by police states:
>
> " 'In the first place, an innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks

of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well known to all criminal trial judges, seems to be ignored by some Supreme Courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one. And this expedient, if sanctioned, saves the State a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' instinct to struggle to save himself by the aid of all technicalities.' "

POINT THREE.

The refusal of the State courts to allow to petitioner a pre-trial inspection of his confession was in accordance with State law, and such refusal did not contribute to any alleged "unfairness" in the proceedings.

Petitioner was taken into custody on the morning of December 18, 1949, and he gave his written confession in the late afternoon and evening of the same date.

On March 3, 1950, before trial of the indictment, petitioner's attorney made application to the County Court for an inspection of petitioner's confession as well as of those

of the other two co-defendants allegedly because his confession had been obtained while he was under arrest without complaint or warrant, without having been advised of his constitutional rights, and that he had been denied counsel while he was under questioning by the police before his arraignment. The County Court denied the application in its entirety, and on appeal to the Superior Court, Appellate Division, the latter court rejected petitioner's contention that he had an absolute right to inspection, without charging any abuse of discretion, and dismissed the appeal. (*State* v. *Cicenia*, 9 N. J. Super. 135.)

On appeal to the New Jersey Supreme Court, it was held that an accused does not have the absolute right to a pre-trial inspection of his confession but such an application is addressed to the sound judicial discretion of the trial court to be exercised only as the interest of justice may require and with the thought in mind that the admissibility of the confession is always a matter for determination at the trial; that an accused has no right to have his confession suppressed before trial; and that he has no right to an inspection of the confessions of his co-defendants. (*State* v. *Cicenia*, 6 N. J. 296.)

We respectfully submit that in refusing to allow to petitioner's attorney a pre-trial inspection of the confession, the courts of New Jersey adopted a rule which is consistent with that of many other jurisdictions. (*State* v. *Haas*, 188 Md. 63, 51 A. 2d 647, Ct. App. 1947; *People* v. *Skoyec*, 50 N. Y. S. 2d 438, Sup. Ct. 1944; *State* v. *Leland*, 190 Ore. 598, 227 P. 2d 785, Sup. Ct. 1951, aff'd 343 U. S. 790, 72 S. Ct. 1002).

What the New Jersey Supreme Court stated on the subject in *State* v. *Tune*, 13 N. J. 203, 218 (1953), can well be repeated here:

> "We can well understand the desire of defense counsel to see the confession in every case particularly where the defendant after having made the confession finds on reflection it is better for himself to forget it. But the wishes and convenience of defense counsel are not the test * * *"

Petitioner, on page 20 of his brief, cites *State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273 in support of the rule that the refusal to furnish the defense with a copy of defendant's confession is *per se* a violation of due process. A reading of that case will disclose that the conclusion was grounded upon a particular set of facts existing in that case. Furthermore, it seems that Louisiana is the only state in the nation where the right to inspection is claimed to exist, and it is recognized that the case expresses a view entirely inconsistent with the law of most of the states. The rule in *State* v. *Dorsey* was rejected in *State* v. *LeLand*, 190 Ore. 598, 228 P. 2d 785, *supra*. (See 20 Tulane L. R. 133, 135 (1945).)

In his brief, page 21, petitioner quotes an excerpt from the opinion in the *Tune* case (*In the Matter of John Henry Tune*, 230 F. 2d 883, cert. den. 351 U. S. 987, 76 S. Ct. 1057), to the effect that failure to give the defense a copy of the confession will constitute a violation of due process "only if prejudice can be shown."

We submit that in the instant case, other than the mere statement that, the refusal to afford to the petitioner a pretrial inspection of his confession, when considered together with the questioning by the police without counsel, resulted

in prejudice, there is nothing in the case to indicate that petitioner actually had been prejudiced in maintaining his defense on the merits, had he seen fit to go to trial.

VI.

Conclusion.

For the reasons hereinbefore set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 177.

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm at Rahway, New Jersey,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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NEW JERSEY CONSTITUTION.

Art. I, Par. 10 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 177.

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm at Rahway, New Jersey,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

Opinion Below.

The opinion of the United States Court of Appeals, Third Circuit, is reported in 240 F. 2d 844 (1957).

Counter-statement of Questions Involved.

1. Does a prisoner have an absolute right under the Constitution (Sixth Amendment) to have the aid and assistance of counsel between the time of his arrest and arraignment, and particularly during the time he is under police questioning and investigation and while he is giving a voluntary confession?
2. Where the prisoner is permitted to consult with his counsel immediately after the confession and is thenceforth represented by counsel throughout every step of the criminal proceedings, that is, at the arraignment which is held without unreasonable delay (the following morning), at the arraignment on the indictment, at the time he enters a plea of non vult to the indictment, and at the time of sentence, can it be said that the accused was denied due process of law?
3. Where the confession was given voluntarily under State law standards as to voluntariness, and it was obtained in compliance with requirements of fundamental fairness under the Fourteenth Amendment, can it be said that the accused was denied due process because he was not allowed a pre-trial inspection of his confession (the denial of inspection being in compliance with State law) upon the claim that the denial of inspection and the denial of counsel between arrest and arraignment were conjunctive factors in the alleged denial of due process?
4. Where the confession was never used against the accused at any trial because he entered a plea of non vult to the indictment, and the plea was entered upon the advice and with the consent of his counsel who was present, can the accused thereafter attack the confession in habeas corpus proceedings upon the mere claim that he was induced to enter the non vult plea because of the existence of the confession?

Counter-statement of the Case.

Vincent Cicenia, the petitioner herein, was granted a writ of certiorari by this Court to review the judgment of the United States Court of Appeals for the Third Circuit, dated January 7, 1957, which affirmed the judgment of the United States District Court for the District of New Jersey, dated July 17, 1956, denying petitioner's application for a writ of habeas corpus (R. 123, 19).

Following is a brief summary of the antecedent events and proceedings in the case.

On the night of March 17, 1947, at about 8:30 P. M., one Charles Kittuah, the owner of a small dry-goods store in the northerly section of Newark, New Jersey, was found shot and killed in his store under circumstances indicating he had been the victim of an armed robbery.

There were no eye witnesses to the crime; the perpetrators had fled the scene; and the crime remained unsolved until December, 1949 (2 years and 9 months later).

Solution of the crime came about in the following manner.

The petitioner, Vincent Cicenia, Armando Corvino, and John DeMasi, were residents of Orange, a suburb of Newark.

Corvino, whose wife had given the Orange police information concerning her husband's involvement in the Kittuah murder, was the first to be taken into custody on December 17, 1949.

As the result of information given by Corvino, the Orange police were alerted to apprehend DeMasi and the petitioner Cicenia.

On the morning of Sunday, December 18, pursuant to a police call at petitioner's home, petitioner Cicenia presented himself at Orange police headquarters, and he was immediately taken into custody and delivered to the Newark police for questioning and investigation.

Shortly thereafter, the third suspect, John DeMasi, was taken into custody and also held for questioning in Newark police headquarters.

Petitioner was first questioned at about noon by Lieutenant Joseph A. Kinney and Detective Carlton B. Norris of the Homicide Squad (R. 95), when petitioner was questioned "briefly and for about 20 or 25 minutes" (R. 96).

The second time petitioner was questioned was two or three hours later, and the questioning lasted "forty-five minutes to an hour," when the petitioner "changed his story after he was confronted by DeMasi" (R. 96).

A Prosecutor's detective, George E. Meagher, who arrived at headquarters after 1:00 P. M., at first questioned DeMasi from about 1:35 to 2:20 P. M., after which he questioned the petitioner from about 3:20 P. M. until about 4:10 P. M. (R. 102).

As a result of the second questioning by Detective Meagher, petitioner gave a detailed oral admission of the commission of the crime and the participation therein by each of the three suspects (R. 103-104).

Thereafter the oral admissions of the three were reduced to writing. Lieutenant Kinney took DeMasi's written statement; Detective Norris took Corvino's; and the Prosecutor's Detective Meagher took the petitioner's written statement, the three statements being taken at about

the same time, and within close proximity of one another (on the 4th floor of Newark police headquarters).

Petitioner's written statement consisted of seven pages. It took Detective Meagher about three hours to write (from 5.17 to 8.10 P. M.). After its completion, the statement was read to petitioner; he himself read it aloud; after which he signed each and every page (R. 105).

Thereafter a disinterested citizen-witness (Mr. Taylor) inquired of petitioner as to the police treatment and petitioner said it was "good or very good or words to that effect" (R. 98).

At the time of the taking of his statement, petitioner was 21 years old, and he had had the benefit of a grammar school education as well as two years of vocational school training (R. 66-67).

The written statement was a voluntary one; and it was not the product of unreasonably lengthy questioning, or threats of violence or promise of reward.

On the afternoon of December 18, 1949, at about 2:00 P. M., Mr. Frank A. Palmieri, an attorney, appeared at Newark police headquarters and requested to see the petitioner, Cicenia, stating he had been retained by the family to represent him.

The attorney was informed that the police and representatives of the State were then engaged in questioning the three men and otherwise investigating the crime, and that upon completion of the investigation the attorney would be able to see and consult with his client.

The investigation was concluded at about 9:30 P. M. at which time the attorney was immediately permitted to consult with his client (R. 27).

All three defendants were arraigned the following morning, December 19th, in the Magistrate's Court at which time petitioner was represented by his counsel; they were properly advised of their rights pursuant to the pertinent rule; and they were remanded to the county jail without bail pending action by the Grand Jury (R. 35-36).

The Essex County Grand Jury (1949 Term) returned an indictment against the three defendants charging that they "did wilfully, feloniously and of their malice aforethought kill and murder Charles Kittuah," etc. (R. 21).

On March 3, 1950, before trial of the indictment, counsel for petitioner, said Mr. Frank A. Palmieri, presented a motion before the County Judge, Hon. Joseph E. Conlon, requesting a pretrial inspection and suppression of petitioner's confession which he had given the police on December 18, 1949, and the motion was denied (R. 35-36).

An appeal was taken from said order of denial and the New Jersey Superior Court, Appellate Division, dismissed the appeal. (See *State* v. *Cicenia*, 9 N. J. Super. 135, App. Div. 1950) (R. 37-40).

On appeal to the New Jersey Supreme Court, the judgment of the Appellate Division was affirmed with modification, and it was held that a defendant does not have the absolute right to a pre-trial inspection of his confession or those of his co-defendants. (See *State* v. *Cicenia*, 6 N. J. 296, 1951.)

On March 26, 1951, the date fixed for trial of the indictment, all three defendants, represented by their individual counsel, offered pleas of *non vult* to the indictment, which was consented to by the prosecuting attorney and accepted by the Court (R. 53-57).

On April 18, 1951, the three defendants were sentenced to life imprisonment (R. 58-65).

In December, 1953, petitioner addressed a petition to the County Court for a writ of habeas corpus claiming therein that: (a) his arrest was an unlawful one; (b) there was an unreasonable delay in his arraignment; and (c) *that he had been denied counsel between the time of his arrest and arraignment* (one of the grounds advanced in his application in the District Court).

The Essex County Court granted to petitioner a writ of habeas corpus and petitioner was allowed a plenary hearing on January 21, 1955. At the conclusion of the hearing the court discharged the writ, holding that petitioner's claims were without merit.

On appeal, the Superior Court of New Jersey, Appellate Division, affirmed the County Court's dismissal of the writ of habeas corpus. The affirmance was dated July 11, 1955, but was not officially reported.

Petitioner thereafter moved before the Supreme Court of New Jersey for leave to appeal as an indigent from the judgment of the Appellate Division, and his motion was denied on September 12, 1955.

Petitioner thereafter applied to this Court for a writ of certiorari to review the New Jersey Supreme Court's denial, and this Court denied certiorari on December 12, 1955. (See *Vincent Cicenia* vs. *State of New Jersey*, 350 U. S. 925, 76 S. Ct. 215.)

Petitioner thereafter sought redress in the Federal courts by applying to the District Court for a writ of habeas corpus substantially upon the same grounds he had ad-

vanced in the State courts; namely, that his arrest and detention for slightly in excess of 24 hours, during a portion of which he was subjected to police questioning, was unlawful; that during the course of the police questioning he gave an involuntary written confession which his counsel was prohibited from inspecting before trial; and that these circumstances allegedly constituted a denial of due process of law.

After a full hearing in the District Court on April 24, 1956 (R. 65-123), the District Court, on July 17, 1956, dismissed the writ of habeas corpus (R. 19-20).

Thereafter, on January 7, 1957, the Court of Appeals affirmed the District Court's judgment of dismissal (R. 124).

In his Brief in his present appeal, petitioner discusses several points which we shall argue in the order presented.

Summary of the Argument.

We respectfully submit that:

1. Petitioner was not entitled, under the Federal and State Constitutions, to the aid and assistance of counsel while he was under police questioning and investigation after his arrest and prior to his arraignment.

2. The fact that under State law petitioner was not permitted to have a pre-trial inspection of his confession did not contribute to any alleged unfairness in the proceedings.

3. Where the confession was a voluntary one under State law and it was obtained, as shown by the record, in accordance with the requirements of fundamental fairness under the Federal Constitution; and where the confession was never used because petitioner entered a plea of non vult to the indictment voluntarily and understandingly upon the advice and with the consent of his counsel, there was no denial of due process.

ARGUMENT.

POINT I.

The denial of assistance of counsel while petitioner was under police questioning and investigation prior to his arraignment was not a violation of due process.

The gist of petitioner's argument under this point seems to be, briefly, that he was entitled to the assistance of counsel while he was under police questioning and during

the investigation of the crime, which was prior to his arraignment, and that such denial constituted a violation of due process under the Fourteenth Amendment, with which we cannot agree.

Following is a brief perspective of the factual situation.

On the morning of Sunday, December 18, 1949, in response to a call by the Orange police, petitioner surrendered to the Orange police at about 9:00 A. M. and at about 10:00 A. M. he was turned over to the Newark police for investigation.

Prior thereto, Armando Corvino, another of the suspects, who had been taken into custody by the Newark police, had implicated the petitioner in the crime and it was his disclosure which led to petitioner's apprehension and detention. The third suspect, John DeMasi, was taken into custody and brought to Newark headquarters about the same time as petitioner.

There was no questioning of petitioner until "About 12:15 or 12:30 P. M.," when Lieutenant Kinney of the Homicide Squad questioned him "briefly and for about 20 or 25 minutes" (R. 96). DeMasi was questioned "around 1:30 or thereabouts" (R. 96).

The only police officers who engaged in the questioning of the three suspects were Lieutenant Kinney, Detective Norris and Prosecutor's Detective Meagher.

The second time the petitioner was subjected to questioning was "about 3:15 or 3:30," when the officers "spoke to him for forty-five minutes to an hour," and, according to Lieutenant Kinney, "At that time Cicenia changed his story after he was confronted by DeMasi" (R. 96).

A County Prosecutor's detective, George E. Meagher, who arrived at headquarters after 1:00 P. M., first questioned DeMasi from "about 1:35 until the neighborhood of 2:20." Thereafter he "started to talk to Cicenia about 3:15 P. M." and continued the questioning "Until about 4:10" (R. 102).

As the result of this second period of questioning by Detective Meagher, after petitioner had been confronted by DeMasi, petitioner gave a detailed oral account of his participation in the crime as well as that of the other two men (See Meagher's testimony, R. 103-104).

After the oral admissions of the three suspects, the task of preparing and writing their individual confessions was assumed by the same three police officers who undertook the oral questioning, namely, Lieutenant Kinney, Detective Norris, and Prosecutor's Detective Meagher.

Lieutenant Kinney took DeMasi's; Detective Norris took Corvino's; and Prosecutor's Detective Meagher took the petitioner's written confession.

Detective Meagher commenced the writing of petitioner's confession "at 5:17 P. M.," and concluded it at "about 8:10 or thereabouts" (R. 105). It consisted of seven pages; and upon its completion, the detective read it to petitioner; the petitioner then read it aloud; and he signed each and every page (R. 105). Thereafter a disinterested citizen-witness (a Mr. Taylor) inquired of petitioner as to the police treatment of him, and he replied it was "good or very good or words to that effect" (R. 98).

At about 2:00 P. M., on December 18, an attorney, Mr. Frank A. Palmieri, appeared at police headquarters and

advised Lieutenant Cohen who was in charge of the desk on the third floor that he represented the petitioner and that he wanted to see the petitioner, but was refused; at about 4:00 P. M. he made a similar request of Detective Norris and was refused; and at 4:46 P. M., he made a similar request of Assistant Prosecutor Maurice J. McKeown, who had joined the police officers in the investigation but did not participate in the questioning, and the Assistant Prosecutor advised the attorney that he could see his client upon the completion of the investigation; and petitioner's attorney was permitted to see and consult with his client at about 9:30 P. M. (R. 23-27).

From the time his attorney was permitted to see him on the evening of December 18, petitioner was continually represented by his counsel throughout every step of the legal proceedings.

Petitioner was represented by his attorney the following morning, December 19, 1949, when he was arraigned before the Magistrate at about 11:00 A. M., and petitioner was properly advised of his rights in conformity with the New Jersey Rules of Practice and Procedure, and a plea of not guilty was entered for him. He was likewise represented by his attorney when he was arraigned upon the indictment. He was also similarly represented on March 26, 1951, when he retracted his plea of not guilty and entered a plea of non vult upon advice of his attorney; and again he was similarly represented on April 18, 1951, when the sentence of life imprisonment was imposed.

It always has been and it is still the established law of New Jersey that an accused's right to counsel contemplates the aid and assistance of counsel *for his defense at the trial,*

and not during the period between his arrest and arraignment. (*State* v. *Grillo*, 11 N. J. 173, S. C. 1952, cert. den. *Grillo* v. *State of New Jersey*, 345 U. S. 976, 73 S. Ct. 1123, 1953; *State* v. *Murphy*, 87 N. J. L. 515, 528-531, E. & A. 1915; *State* v. *Bunk*, 4 N. J. 461, 470, 1952, cert. den. 340 U. S. 839, 71 S. Ct. 25; *State* v. *Cole*, 136 N. J. L. 606, E. & A. 1949, cert. den. 334 U. S. 851, 68 S. Ct. 1503).

In *State* v. *Grillo, supra,* the New Jersey Supreme Court reaffirmed the rule that an accused is not entitled to consult with counsel "*during the police interrogation,*" when it said, page 180:

> "With respect to the allegations of denial of permission to consult counsel during the police interrogation, the former Court of Errors and Appeals has expressly determined this alleged constitutional question, denial of counsel during the period between arrest and arraignment and its effect on a confession obtained during that period, adversely to the contentions here presented by the defendants."

The New Jersey Supreme Court followed the principle firmly established by the former New Jersey Court of Errors and Appeals in *State* v. *Murphy*, 87 N. J. L. 515 (1915), where the specific question here involved had been squarely presented and determined; namely, whether the refusal to permit counsel to consult with an accused between the time of the latter's arrest and arraignment constitutes a denial of the constitutional right to aid and assistance of counsel.

In the *Murphy* case, *supra,* while the accused was in jail, the sheriff refused an attorney permission to see the accused until after the confession was made. At the trial,

defendant requested the trial judge to charge the jury that if they believed that the defendant had been denied the assistance of counsel they should consider the denial in appraising the credibility of the confession, which request was denied.

In sustaining the trial judge's denial of the request, the Court made the following significant statement (pp. 529-530):

> "The contention on behalf of the defendant is that he was denied a right under both the federal and state constitutions to be represented by counsel from the time of his arrest. The provisions in each of the instruments invoked on behalf of the defendant are the same.
>
> "The proposition advanced is novel. What infinite confusion would result if a criminal defendant could not be proceeded against without the assignment of counsel by an inferior magistrate, if the prisoner had retained none at the time of his arrest!
>
> "The constitution of the United States, by article 6 of the amendments, provides, *inter alia*, that in all criminal prosecutions the accused *shall enjoy the right* to have the assistance of counsel for his defense. 9 Fed. Stat. Anno. 324.
>
> "The contention that the defendant was denied a right under the constitution of the United States to be represented by counsel from the time of his arrest, in giving credence to the confession, is disposed of by the fact that the sixth amendment applies exclusively to the powers exercised by the federal judiciary and is not a limitation upon the powers of the states."

Further, the Court said (pp. 530-531):

"It is to be observed that the constitution does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for the *defence*. Obviously, the word *defence*, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defence. A criminal defendant at large on bail has this latter privilege to the full. By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession* is a thing entirely apart from *defence* upon a trial. This is evidenced every day by the pleas of guilty made by criminal defendants without the assistance of counsel to advise them thereon. A plea of guilty amounts to a confession in open court.

"The constitutional provision, whose protection is invoked, contemplates a criminal prosecution and provides for a speedy and public trial by an impartial jury, that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and (conjunctively) have the assistance of counsel for his defence. It clearly appears that the rights thus intended to be secured to a criminal defendant are rights arising from a criminal prosecution—that is, a trial upon an indictment. A prisoner making a confession is not confronted with any witnesses, at least never in the sense that they are examined in his presence, he can have no process for witnesses in his favor upon such an occasion, and, conse-

quently, he is not entitled to the assistance of counsel to save him from himself. That is done later by the trial court if the confession were unlawfully obtained."

In *State* v. *Bunk, supra* (certoriari denied 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615) it is stated (p. 470):

> "• • • the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, *not to save him from his own voluntary acts.*" (Emphasis supplied.)

In affirming the District Court's denial of a writ of habeas corpus, the Court below apparently felt constrained to permit the New Jersey rule on this question to be upheld under the circumstance unless, as the Court below stated, the New Jersey Supreme Court "reverses its holding" or this Court reverses the New Jersey Supreme Court (R. 124).

We respectfully submit that the conclusion of the New Jersey Court of Appeals in the *Murphy* case, *supra,* to the effect that an accused's constitutional right to the aid and assistance of counsel "*for his defence,*" relates to the *defense* of the accused if and when he is put to trial and not during the period between his arrest and arraignment or at the time he is being questioned and investigated by the police, is founded upon sound, logical reasoning.

The Sixth Amendment to the Federal Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

With a slight change of words, the New Jersey Constitution contains substantially identical provisions, as follows (Art. I, par. 10):

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

The provisions in both constitutions clearly refer to the *trial* of an accused in a criminal prosecution.

These are the specific rights given in connection with a criminal trial:

1. A speedy and public trial by an impartial jury;
2. To be informed of the nature and cause of the accusation;
3. To be confronted with witnesses against him;
4. To have compulsory process for obtaining witnesses in his favor; and
5. To have the assistance of counsel for his *defence*.

There is nothing in the section which refers directly or inferentially to the right to assistance of counsel from the

moment an accused is placed under arrest and questioned and investigated in connection with a crime committed.

When a criminal suspect is questioned by the police and is giving a confession, is he entitled to the confrontation of witnesses in the sense that they must be examined in his presence? Or, on such an occasion, is he entitled to process for obtaining witnesses in his favor? We think not.

The rights specifically set forth in the Sixth Amendment as well as in the State Constitution above referred to can have no other meaning than that an accused is entitled to have counsel represent and defend him "when put in jeopardy on his trial;" and that his counsel shall have reasonable access to him for the purpose of preparing and presenting his defense *at his trial.*

In his Brief, petitioner devotes nsiderable argument to the evil of "uncontrolled" and "prolonged" interrogation by the police which he claims can be curbed by giving to an accused the right to have his counsel present during the police interrogation, citing and quoting from *Haley* v. *Ohio*, 332 U. S. 596, and *Watts* v. *Indiana*, 338 U. S. 49 (B. 11).

In the instant case, the confession was taken not only in accord with the New Jersey rule of admissibility on the basis of voluntariness, but the methods used were in strict conformity with the constitutional requirements of "fundamental fairness essential to the very concept of justice," under the Fourteenth Amendment to the Federal Constitution.

Here there was none of the continuous, prolonged questioning and grilling by relays of police officers under con-

ditions and circumstances determined by this Court to be improper and oppressive such as prevailed in the above-cited cases.

The only officers who took part in the questioning of the petitioner as well as his two confederates were two detective members of the Newark Homicide Squad (Kinney and Norris) and the Prosecutor's Detective Meagher. The Assistant Prosecutor, Mr. McKeown, was in and about headquarters during the police questioning and investigation but he did not actively participate in any questioning.

The record does not support any contention of police brutality. At the hearing in the District Court, any claim of alleged threats or violence by the petitioner was abundantly contradicted by the police officers and county official who testified that petitioner had not been subjected to any force or violence or threats, or any physical discomfiture.

Petitioner, in his Brief, indulges in extensive discussion generally on the use of "Third Degree" methods (citing and quoting from Frank and Frank's "Not Guilty;" Meerloo's "Rape of the Mind;" and Borchard's "Convicting the Innocent"); and he urges that an effective way to avoid any physical or mental coercion upon a suspect under police investigation is to permit an attorney to be present during the police interrogation.

We take the positive position that in this case the petitioner was not subjected to any physical or mental coercion before or at the time of the taking of his confession; and on the question whether counsel should be permitted to be present during the police questioning and investigation, we incline to the New Jersey rule that the constitutional pro-

vision cannot be construed to mean that an accused has such right. As stated in *State* v. *Murphy, supra*, page 530:

> "• • • By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess • • •."

Petitioner cites and quotes from *Williams* v. *Kaiser*, 323 U. S. 471, as well as an excerpt from the dissenting opinion in *Canizio* v. *New York*, 327 U. S. 82 (B. 17, 18), purportedly in support of his contention that an accused is entitled to the benefit of counsel not only at his trial but also during the police interrogation prior to his arraignment, which, he claims, is a "fundamental right." We do not consider those cases as supporting such a rule.

In *Williams* v. *Kaiser, supra*, the court failed to comply with defendant's request for assignment of counsel to defend him *at the trial*, and rather than go to trial without counsel he pleaded guilty. This was held to be a denial of due process because, as this Court pointed out, while a conviction based upon a guilty plea should not be lightly impeached, such a plea in a capital case must be given serious consideration where defendant *asked for counsel at the trial* and his request was not complied with by the court, especially where he was incapable of making his own defense.

The *Canizio* case, *supra*, would seem to support our contention. There a 19-year old defendant pleaded guilty to robbery, claiming he was not represented by counsel at the time of the plea and was not advised of his right to counsel. The State showed that an attorney had filed a "notice of appearance" in defendant's behalf two days before the

sentence, and this Court held that, "even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally;" that petitioner "actually had the benefit of counsel;" and when counsel took over the defense "he could have raised the question of a defect in the earlier part of the proceedings." (p. 453 bottom, to p. 454 of 66 S. Ct.)

The New Jersey rule laid down in *State* v. *Murphy*, 87 N. J. L. 515, *supra*, has been followed in several other jurisdictions.

In *State* v. *Sullivan*, 227 F. (2) 511 (10 Cir. 1955), two defendants, 19 and 21 years old, were convicted of murder in the Utah State court; their conviction was affirmed by the Utah Supreme Court; and certiorari was denied by this Court. Thereafter they sought and obtained a writ of habeas corpus in the U. S. District Court in which it was claimed that upon their arraignment before a committing Magistrate in the State Court they requested and were refused counsel on their preliminary hearing, the Magistrate having advised them that counsel would be furnished *at their trial*. The District Court upheld their contention, but the Court of Appeals reversed, holding that the right to aid and assistance of counsel guaranteed by the constitutional amendment "does not accrue until the indictment is returned or an information or other like charge is lodged against the accused." (Citing *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195; *Hauck* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116; and *Gilmore* v. *U. S.*, 129 F. (2) 199, cert. den. 317 U. S. 631, 63 S. Ct. 55). In reversing the District Court, the Court of Appeals pointed out that, at the hearing be-

fore the Magistrate the defendants did not enter any pleas of guilty; they did not testify; they made no confessions nor any incriminating statements before the Magistrate; and the failure to furnish them counsel at that time was not a prejudicial abridgement of their constitutional rights, the Court of Appeals stating that "The constitutional provision contains no express or implied command that an accused shall be furnished counsel at the preliminary hearing." This Court denied certiorari to review the judgment of the Court of Appeals. (See *Braasch and Sullivan*, v. *State of Utah*, 350 U. S. 973, 76 S. Ct. 449.)

In *People* v. *Crooker*, 303 P. (2) 753 (Cal. S. C. 1956), wherein this Court has granted certiorari to review the judgment of the California Supreme Court (354 U. S. 908, 77 S. Ct. 1300 certiorari granted June 10, 1957), defendant was convicted of murder in the first degree. At the trial he testified that following his arrest, while he was being questioned by police officers, he repeatedly requested the assistance of counsel but was informed he would be permitted to call an attorney as soon as the officers "were through with him." At the trial, the judge charged the jury that they could consider whether defendant was denied an opportunity to consult with his counsel on the question of the voluntariness of his confession. In rejecting the defendant's contention that the refusal to permit him to consult with his counsel during his interrogation by the police officers constituted a denial of due process, the Court very pointedly stated that, while an accused is entitled to the constitutional right to be represented by counsel in every stage of the proceedings, the denial "must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage

of justice;" and that the record disclosed that the police officers' conduct relative to defendant's request for an attorney in no way affected the voluntariness of defendant's confession.

In *State* v. *Rogers*, 120 A. (2) 409 (Conn. Sup. Ct. of Errors, 1956), in which this Court denied certiorari (351 U. S. 952, 76 S. Ct. 850, certiorari denied May 28, 1956), the facts and circumstances were far more grave than in the instant case. There the murder was committed on November 21, 1953. About 6 weeks later, on January 9, 1954, defendant was picked up by the police in another city upon a charge of burglary. Upon his arrest he engaged counsel (a Mr. Corse) to represent him on that charge. He was arraigned on the burglary charge on January 13, and remanded to jail in default of bail. On January 30, he was suspected of the murder of the previous November and taken from the jail to the State attorney's office where he was first advised of the murder and subjected to questioning. He immediately asked to see his lawyer (Mr. Corse) and his request was refused. He was subjected to continued questioning from 1:00 P. M. until the morning hours the following day. After the police threatened to take his sick wife into custody and turn his children over to the juvenile authorities, and the police pretended to make two telephone calls to put their threat into effect, defendant made a confession. He was returned to the jail on the morning of January 31. The coroner ordered the jailer to hold the defendant incommunicado and not to let his lawyer see him. When the lawyer arrived at the jail and requested to see the defendant, the sheriff called the State attorney and was advised not to allow the attorney to see the defendant under any circumstances. About noon police officers

arrived at the jail and questioned defendant over his lawyer's objections. Later the same afternoon defendant was taken to the coroner's office where defendant made further incriminating statements which were reduced to writing and signed by defendant, and they were introduced in evidence at his trial. In affirming the conviction the court stated that, even if all of the circumstances alleged by defendant were true, it would not, standing alone, render the confessions inadmissible, and unless the officers' conduct induced the defendant to confess *falsely*, their conduct did not vitiate the confessions.

Cases cited and quoted from on pages 21-22 of petitioner's Brief (*Williams* v. *Kaiser, supra; Uveges* v. *Pennsylvania*, 335 U. S. 437; *Hawk* v. *Olson*, 326 U. S. 271; and *White* v. *Ragen*, 324 U. S. 760) involved the lack of counsel *at the trial* and not during any pretrial interrogation of the defendant.

Williams v. *Kaiser* has been heretofore discussed. In *Uveges*, a 17-year old defendant under four charges of burglary was never informed of his right to counsel and he was never offered counsel at any stage of the entire criminal proceedings. He was induced to plead guilty upon the prosecuting attorney's promise that he would receive a Reformatory sentence but instead he was given a 20 to 40 year Penitentiary sentence, which was unquestionably a violation of due process. In *Hawk* v. *Olson*, the defendant was taken from Kansas to Nebraska; he was held incommunicado in jail where he was visited for 15 minutes by the Public Defender and his assistant who tried to intimidate him into pleading guilty, after which they left him saying they would have nothing to do with his trial. The follow-

ing morning defendant was arraigned on a charge of murder and he pleaded guilty without counsel; defendant requested a 24-hour adjournment of trial in order to consult with counsel and prepare his defense which was refused; his trial commenced without counsel and after two or three jurors were impaneled the Public Defender and his assistant stepped forward and entered the case; they never conferred with defendant before the trial, and the court never assigned any counsel to represent him; and after impaneling of the jury there was a recess of the trial until the following morning. This Court held there was a clear violation of due process. In *White* v. *Ragen, supra,* court-appointed counsel failed to confer with defendant until the case was called for trial and counsel told him he would do nothing unless defendant had some money. When defendant requested his counsel to call a certain witness in his behalf, counsel said he "did not have time" as he had another case in another court; counsel demanded that defendant plead guilty when the court refused to grant a continuance; when defendant made a request for a continuance of trial, the court told him to "keep still" as his attorney would do all the talking for him; and finally in despair the defendant entered a plea of guilty. This was held to be a lack of "effective" counsel, resulting in denial of due process.

Chandler v. *Fretag,* 348 U. S. 3, 75 S. Ct. 1 (1954), cited by petitioner (B. 22) did not involve the question of right to assistance of counsel between arrest and arraignment, but rather the trial court's refusal to grant the defendant his request for a continuance of the trial to permit him to engage counsel in his behalf and compelling the defendant to go to trial without counsel; and the circumstances of the

trial and entire proceeding (which took but 5 to 10 minutes) clearly smacked of denial of process.

In *Anderson* v. *Treat*, 172 U. S. 24 (1898) (B. 22), where the defendant was convicted of murder on the high seas and in a habeas corpus proceeding he claimed he was denied counsel at the time he told his story to a U. S. Marshal, this Court held that the conviction could not be collaterally attacked and a denial of a writ of habeas corpus was affirmed.

In *Canizio* v. *New York*, 327 U. S. 82 (B. 23), as hereinbefore pointed out, this Court held that the defendant "actually had the benefit of counsel" prior to sentence and there was no denial of due process.

In *Stroble* v. *California*, 343 U. S. 154, 72 S. Ct. 599 (1952), quoted from by petitioner (B. 23), the defendant was questioned in the district attorney's office in connection with a murder for almost an hour when an attorney who said he had been sent by defendant's son-in-law made a request to inquire of defendant personally as to his guilt of the crime and report it back to the son-in-law; and the attorney's request was refused. This Court held that the refusal was not a denial of due process "*either independently or in conjunction with all other circumstances in the case,*" such as, that defendant's interrogation took place in the presence of some nineteen persons connected with the district attorney's office and police department; that the district attorney allegedly inspired certain inflammatory newspaper reports prior to the trial; that defendant was without counsel at a sanity hearing; and that there was an unwarranted delay in defendant's arraignment.

The facts and circumstances in *U. S. ex rel. Caminito* vs. *Murphy*, 222 F. (2) 698 (2d Circ. 1955), cert. den. 350 U. S. 896, cited and quoted from (B. pp. 23-24), and strongly relied upon, are vastly different from those in the instant case. There the defendant was arrested on Sunday, May 11, 1941 at 6:00 P. M. and five or six officers questioned him from 9:00 P. M. until 2:00 A. M. the next morning, a period of five hours; he was then placed in a cell; he was given no bed, spring, or mattress and blankets, but compelled to sleep on a wooden bench. Questioning of defendant was resumed the next morning at 10:00 A. M. and continued all day. Members of his family, a friend, and an attorney who called at the police station and attempted to get information concerning defendant were refused any information; defendant was kept incommunicado and no one was permitted to see him until his arraignment about 40 hours after his arrest. Two female, and one male, detectives in disguise, on May 12, posed as witnesses purporting to identify the defendant as the person behind the wheel of the get-away car at the time of the stickup and shooting, whereas they were not witnesses at all and defendant was not told that they were detectives. Defendant signed confessions at about 9:00 P. M. of May 12 (27 hours after his arrest); and he was not arraigned until late the following day, May 13. Furthermore, the above facts *were not disputed by the State*. Besides, it was shown that under New York law a City Court was required to be open every day, including Sundays; a magistrate was always available; and there was no justification for the delay in arraignment. Under the facts and circumstances of that case, there was a clear denial of due process.

The case of *Fikes* v. *State of Alabama*, 352 U. S. 191, 77 S. Ct. 281 (1957) (a portion of the dissenting opinion being quoted from, B. 25), certainly does not support petitioner's contention that the refusal to permit a prisoner's attorney to see and consult with him while the prisoner is being questioned and investigated by the police prior to his arraignment constitutes a denial of due process. There the defendant's conviction for burglary with intent to rape followed by a death sentence resulted largely from what this Court said was a "totality of circumstances" leading to coerced confessions, such as, lack of education and low mentality of the accused; his arrest by civilians, lodgment in jail and his subsequent removal to a distant prison; his intermittent questioning for hours at a time over a period of 5 days prior to his first confession; keeping the defendant in isolation for an entire week; the continued questioning for several days before the second confession; and the denial of protection at a preliminary hearing contrary to State law. Under the circumstances of that case, this Court properly concluded that the pressure applied to the defendant, a person weak of mind and will, amounted to a denial of due process. The attorney attempted to see the petitioner about a week after the arrest, 2 days after the first confession and 3 days before the second confession.

Let us contrast the facts and circumstances in the *Fikes* case with those in the case at bar.

Here the petitioner was taken into custody on the morning of December 18 in Orange and he was immediately taken to Newark police headquarters at about 10:00 A. M. One of petitioner's confederates (Corvino) had been questioned in Newark headquarters on the preceding day, and

it was the information he had given the police which led to petitioner's apprehension. The other confederate (DeMasi) was taken into custody about the same time that petitioner was taken to Newark headquarters. There were only three police officers who participated in the questioning of the three men. There was no questioning of petitioner until "About 12:15 or 12:30 P. M." when Lieutenant Kinney talked with him "briefly and for about 20 or 25 minutes" (R. 96). DeMasi was questioned "around 1:30 or thereabouts" (R. 96). The next time petitioner was questioned was "about 3:15 or 3:30" for "forty-five minutes to an hour," at which time petitioner "changed his story after he was confronted by DeMasi" (R. 96.) Prosecutor's Detective Meagher first talked with DeMasi "about 1:35 until the neighborhood of 2:20," and then he took up the questioning of petitioner "about 3:15 P. M." and he continued the questioning "Until about 4:10" (R. 102). It was during this second questioning, after he was confronted by DeMasi, that petitioner gave an oral confession of the details of the crime participated in by all three men (R. 102-104). Prosecutor's Detective Meagher took petitioner's written confession from about 4:10 to shortly after 8:00 P. M.; Lieutenant Kinney took DeMasi's written confession; and Detective Norris took Corvino's written confession, the three written confessions being taken at about the same time on the fourth floor of Newark police headquarters. After petitioner's written confession was completed, he was interviewed by an impartial citizen-witness as to police treatment and petitioner acknowledged that there was no police mistreatment of any kind, saying it was "good or very good or words to that effect" (R. 98). Assistant Prosecutor McKeown, who was in and out of the

room at police headquarters while the questioning of the three men was in progress and while their written confessions were being taken, first saw petitioner's attorney (Mr. Palmieri) when he descended from the fourth floor at 4:46 P. M. (R. 114), and he informed the attorney that he would be able to see his client when the investigation was completed (R. 114).

It was not until the habeas corpus hearing in the District Court that petitioner complained of any alleged threats of violence by any of the officers. He made no complaint of any kind in any of the proceedings in the State courts, either at his arraignment on the murder charge the following morning, December 19, in the Magistrate's court, or in the County court when he was arraigned on the murder indictment or when he entered his plea of non vult, or when he was sentenced. He was represented by his counsel upon each and all of these occasions.

At the habeas corpus hearing in the District Court, any allegation by petitioner of any mistreatment was specifically and vigorously denied by the State witnesses (testimony of Prosecutor's Detective Meagher, Detectives Kinney and Norris of the Newark Homicide Squad, and Assistant Prosecutor McKeown).

It is of significance that petitioner's confession which he attacked in the Federal Court for the first time had never been used against him, sin he entered a plea of non vult; and there never was any trial. Had there been a trial, the State would have been prepared to show that his confession was given voluntarily.

As to petitioner's complaint that his attorney had not been permitted to see him while he was being questioned

and investigated in Newark headquarters, the attorney did see petitioner immediately upon completion of the investigation and signing of the confession; the same attorney represented him the following morning at the arraignment before the Magistrate; and the same attorney continued to represent him thereafter throughout every step of the criminal proceedings down to the entry of the non vult plea on March 26, 1951 and the imposition of sentence on April 18, 1951.

In re Groban's Petition, 352 U. S. 330, 77 S. Ct. 510 (1957), cited and quoted from (B. 25-27), does not support petitioner's contention. There a Fire Marshall, acting under an Ohio statute, conducted an investigation into the causes of a certain fire, and when certain witnesses refused to be sworn and testify before him unless they were represented by counsel, they were committed to jail. The question was whether the action of the Fire Marshall was a denial of due process. This Court concluded that, since the proceeding before the Marshall was not a criminal trial but merely a proceeding to elicit facts relating to the causes of the fire and to determine the existence of sufficient evidence upon which to base a formal charge of arson, the witnesses summoned were not entitled to the assistance of counsel.

We respectfully submit that in the instant case, particularly where the confession was in every respect a voluntary one and in accord not only with the State standards of voluntariness but with the constitutional requirements of fundamental fairness, the course followed by the police and prosecuting officials in refusing to permit counsel to see or consult with petitioner while he was in the process of being

questioned and investigated prior to his arraignment was in strict conformity with the time-honored principles of New Jersey law firmly established in the New Jersey cases of *State* v. *Murphy, supra,* and adhered to in *State* v. *Cole, State* v. *Bunk* and *State* v. *Grillo,* heretofore referred to, to the effect that an accused's constitutional right to counsel contemplates the aid and assistance of counsel for his *defense at his trial,* and not during the period between his arrest and arraignment.

POINT II.

The refusal of the State courts to allow a pre-trial inspection of petitioner's confession did not contribute to any alleged "unfairness" in the proceedings.

Petitioner was taken into custody on the morning of December 18, 1949, and at about 10:00 A. M. he was turned over to the Newark police for questioning and investigation.

The actual questioning of petitioner did not commence until all three of the men were in custody. Petitioner was first questioned by Lieutenant Kinney who questioned him briefly for 20 to 25 minutes, and petitioner was returned to a cell. The next questioning of petitioner was not resumed until about 3:15 P. M. when he was questioned for 45 minutes to one hour. Up to that time he maintained his innocence, but upon being confronted by DeMasi, he "changed his story." Prosecutor's detective Meagher questioned him from 3:15 to 4:10 P. M., and it was during this interview that petitioner gave Meagher a full account of the details of the crime and of his participation in the crime

and that of his confederates (Corvino and DeMasi). (See R. 103-104).

The writing of petitioner's confession was not begun until about 5:17 P. M. and completed at about 8:10 P. M., after which the citizen-witness inquired of petitioner relative to the police treatment, and petitioner made no complaint about police treatment.

Petitioner's counsel (Mr. Palmieri) made a request to see petitioner of Assistant Prosecutor McKeown at about 4:46 P. M., which was after petitioner had given an oral statement to Prosecutor's detective Meagher but before the writing of the confession.

Petitioner's counsel was permitted to see his client soon after 9:00 P. M., after the writing of the confession was completed and after the inquiry by the citizen-witness (Taylor).

On March 3, 1950, before any trial of the indictment, petitioner's attorney made application to the County Court for an inspection of petitioner's confession as well as his co-defendants' confessions, advancing as his grounds the claim that it had been obtained while petitioner was under arrest without complaint or warrant, that at the time of his confession he had not been advised of his constitutional rights, and because he had been denied counsel while he was under police interrogation.

The County Court denied the application in its entirety. (R. 36); and on appeal the Appellate Division of the New Jersey Superior Court rejected petitioner's contentions and dismissed the appeal. (*State* v. *Cicenia*, 9 N. J. Super. 135, R. 37-40.)

The New Jersey Supreme Court affirmed with modification (*State* v. *Cicenia*, 67 N. J. 296, 78 A. 2d 568), and it held that an accused does not have the absolute right to a pre-trial inspection of his confession but such an application is addressed to the sound judicial discretion of the trial court to be exercised only as the interest of justice may require, with the thought in mind that the admissibility of a confession is always a matter for determination if and when offered at the trial; that an accused has no right to suppression of his confessions before trial; and that he has no right to inspection of the confessions of his co-defendants.

The New Jersey rule is consistent with that of other jurisdictions. (*State* v. *Haas*, 188 Md. 63, 51 A. 2d 647, Ct. App. 1947; *People* v. *Skoyec*, 50 N. Y. S. 2d 438, Sup. Ct. 1944; *State* v. *Leland*, 190 Ore. 598, 227 P. 2d 785, Sup. Ct. 1951, aff'd 343 U. S. 790, 72 S. Ct. 1002).

In a later New Jersey case, *State* v. *Tune*, 13 N. J. 203 (Sup. Ct. 1953), the rule in the *Cicenia* case, *supra*, was reaffirmed, and this Court denied certiorari. See *Tune* v. *New Jersey*, 349 U. S. 907, 75 S. Ct. 584).

What the New Jersey Supreme Court said in the *Tune* case, 13 N. J., on page 218, is most appropriate here:

> "We can well understand the desire of defense counsel to see the confession in every case particularly where the defendant after having made the confession finds on reflection it is better for himself to forget it. But the wishes and convenience of defense counsel are not the test * * *."

Petitioner refers to the rule in Louisiana (*State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273) (B. 30), that the refusal to

furnish the defense with a copy of defendant's confession is per se a violation of due process. Careful reading of that case will disclose, first, that the conclusion was grounded upon a particular set of facts which existed in that case, and secondly, Louisiana happens to be the only state, within our research, to maintain such rule.

The Louisiana rule was flatly rejected by the Oregon Supreme Court in *State* v. *Leland,* 190 Ore. 598, 227 P. 2d 785 (Sup. Ct. 1951); and this Court affirmed the judgment in the Oregon case in *Leland* v. *State of Oregon,* 343 U. S. 790, 72 S. Ct. 1002 (1952), wherein it is stated (p. 1009 of 72 S. Ct.):

> "• • • While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in Court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addition the trial judge offered further time for that purpose but it was refused. There is no indication in the record that appellant was prejudiced by the inability of his counsel to acquire earlier access to the confession."

In the instant case, petitioner's confession was never used because there was no trial. He admitted his guilt in open court when he retracted his original plea of not guilty and entered a plea of non vult upon the advice and with the consent of his counsel, the confession being taken on December 18, 1949, and his plea of non vult being entered on March 26, 1951 (after a lapse of 15 months).

Under this point, petitioner lays stress upon the dissenting opinion in the New Jersey case of *State* v. *Tune, supra,* (B. 29), and he cites and quotes from various law reviews and discussions which tend to disagree with the New Jersey rule in *Tune* that an accused has no absolute right to a pre-trial inspection of his confession, his argument being that, when the factor of the refusal of counsel during the police interrogation is coupled with the factor that petitioner was refused a pre-trial inspection of his confession, there is a resultant denial of due process, with which we cannot agree.

As we pointed out under our Point I, the refusal to permit counsel to consult with his client while petitioner was under police interrogation and investigation was in strict conformity with the established law of New Jersey under the New Jersey cases of *Murphy, Cole, Bunk* and *Grillo,* hereinbefore discussed.

As we have pointed out under this point, the refusal to permit counsel to inspect petitioner's confession before trial was also in accordance with the New Jersey rule first laid down in *State* v. *Cicenia,* 6 N. J. 296, *supra,* and since reaffirmed in *State* v. *Tune,* 13 N. J. 205, in which this Court denied certiorari in *Tune* v. *New Jersey,* 349 U. S. 907, 75 S. Ct. 584.

Therefore, under these circumstances, how can it be said that by joining the two factors (refusal of counsel during police interrogation, and refusal of pre-trial inspection of confession), where each of the factors was in conformity with New Jersey law and this Court has not as yet disagreed with either of the two rules, necessarily spell out such a "fundamental unfairness" to petitioner as to amount to a denial of due process under the Fourteenth Amendment?

As to the complaint that petitioner was not permitted to see his counsel while he was under police interrogation, it is significant that petitioner had the benefit of his counsel from the time the confession was completed on the evening of December 18, 1949 down through every step of the criminal proceedings to the time of his sentence on April 18, 1951.

And as to the complaint that petitioner was denied a pre-trial inspection of his confession, we cannot see how he was in any way prejudiced by such denial, since he would have been given ample opportunity to make a collateral attack upon his confession had he seen fit to go to trial on the merits. But this he did not do.

In the instant case, other than petitioner's present claim that the refusal of counsel during his police interrogation and the refusal of a pre-trial inspection of his confession, when viewed together, resulted in prejudice, we find nothing in the record to indicate that petitioner was in any way prejudiced to the extent that he was denied due process of law.

POINT III.

Petitioner's confession was a voluntary statement under State law, and it was obtained in accordance with the requirements of fundamental fairness under the Fourteenth Amendment; and since the confession was never used against petitioner because of his plea of non vult, and since the plea was entered voluntarily and understandingly upon the advice and with the consent of his attorney, petitioner was not denied due process.

The gist of petitioner's argument under this point seems to be, briefly, that the confession was extorted from him by the police at a time when his attorney was denied access to him; and, since he was induced to plead non vult to the indictment because of the existence of the confession, he was denied due process, with which we cannot agree.

It is the respondent's contention, first, that the confession was not extorted from him but given voluntarily in accordance with State law on admissibility, and obtained in compliance with the requirements of fundamental fairness under the 14th Amendment; and secondly, since the State made no use of the confession because petitioner entered a plea of non vult to the indictment, and since the plea was entered voluntarily and understandingly upon the advice and with the consent of counsel, petitioner cannot claim any denial of due process.

(a.) Petitioner's confession was given voluntarily in accordance with State law on admissibility, and in compliance with the requirements of fundamental fairness under the 14th Amendment.

At the hearing on habeas corpus in the District Court, petitioner testified to certain acts of violence, threats and

abuse allegedly perpetrated by police officers during his interrogation and investigation on December 18 in Newark police headquarters (R. 70-73).

In cross examination, he named the officers who questioned him (Assistant Prosecutor McKeown and Detectives Kinney, Norris, Meagher and Gross) (R. 77), that the "beating" was by uniformed policemen committed in the presence of Kinney, Norris and Meagher but not in the presence of the Assistant Prosecutor (R. 79-80); and when asked as to their identity he said, "I wouldn't be able to pick them out" (R. 78).

The State specifically and directly contradicted each and every statement of petitioner with regard to his alleged police mistreatment.

Lieutenant Kinney testified that petitioner was given food "around 1 o'clock" (R. 96); that petitioner had not been subjected to any abuse or any threats or physical violence by anyone (R. 97); Detective Meagher of the Prosecutor's staff for over 27 years testified that petitioner was not subjected to any abuse or threats or violence (R. 106), that petitioner at first gave him an oral account of the details of the crime and the part played therein by each of the three participants (R. 103-104), that the 7-page written confession was based upon the information which petitioner had given, saying, "I questioned Mr. Cicenia and the answers I put down in this form" (R. 105), that it took from 5:17 P. M. to about 8:10 P. M. to write the confession in longhand (R. 105), that he read the confession to petitioner and petitioner himself read it aloud (R. 105), that petitioner signed each and every page (R. 105), and that petitioner was afterwards questioned by a disinterested citizen-

witness (Mr. Taylor) as to police treatment and petitioner acknowledged he had been treated properly (R. 105-106).

Assistant Prosecutor McKeown and Detective Norris also testified and corroborated Kinney and Meagher in every detail in respect to the voluntariness of the confession and the fair treatment of the officers.

It is the established rule in New Jersey that to be admissible a confession must be proven to have been freely and voluntarily given, and that it cannot be induced by hope or fear or other considerations leading to substitution of something else than the truth. (*State* v. *Rios*, 17 N. J. 572, 599-601, S. C. 1955; *State* v. *Walker*, 15 N. J. 485, S. C. 1954; *State* v. *Grillo*, 11 N. J. 173, S. C. 1952).

We respectfully submit that in the instant case the confession was not only in accord with the New Jersey rule of admissibility, but it was procured by means strictly in conformity with the standards of "fundamental fairness" required by the Fourteenth Amendment of the Federal Constitution. (Cf. *Watts* v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1801; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. Ed. 1440, 1949; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. Ed. 1810, 1949).

Here it cannot be said that the confession was the result of continuous, prolonged questioning and grilling by relays of officers under conditions and circumstances determined by this Court in the *Watts*, *Harris* and *Turner* cases, *supra*, to be improper and oppressive and violative of the rule of "fundamental fairness."

It is to be noted that the only police officials and officers who undertook the investigation and questioning of not

only the petitioner but of his two confederates were an Assistant Prosecutor (McKeown), a Prosecutor's detective (Meagher), and two detective members of the Newark Homicide Squad (Kinney and Norris).

The record does not support petitioner's claim of police brutality, and his testimony was abundantly contradicted by the State witnesses in every detail.

(b) The State made no use of the confession because petitioner entered a plea of non vult to the indictment; and since the plea was entered voluntarily and understandingly upon the advice and with the consent of counsel, petitioner cannot claim denial of due process.

As we have pointed out under subdivision (a) of this Point, it was established by the State at the hearing on the writ in the District Court by the greater weight of the evidence that petitioner's confession was given freely and voluntarily and that it was procured by means consistent with constitutional standards of "fundamental fairness."

If petitioner had gone to trial he could have attacked the legality of his confession and the State would have been required to establish its voluntariness as a prerequisite to its admissibility in accordance with State law and that it was procured by means consonant with due process.

However, petitioner chose not to go to trial and some 15 months after the taking of the confession he entered a plea of non vult to the indictment in open court in the presence and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, in view of petitioner's plea of non vult, there was no longer any need for use of the confession and the trial judge ac-

quired the necessary jurisdiction to impose an appropriate sentence.

We respectfully submit, too, that under such circumstances the petitioner could not thereafter make any proper and legitimate attack upon his confession by way of habeas corpus proceedings.

In the case of *In re Domako*, 20 N. J. Super. 314, 90 A. 2d 30 (N. J. App. Div. 1952), aff'd 11 N. J. 591, 95 A. 2d 505 (N. J. S. C. 1953), the defendant pleaded guilty to four indictments and was given a prison sentence. Thereafter he applied for habeas corpus, claiming, as one of his grounds, his unlawful detention for seven days following his arrest and before he was arraigned; that during the detention he was subjected to continued questioning and physical force which led to the giving of his confession. His contention was rejected because "*he pleaded guilty and if confessions were made by him, no use was ever made thereof*" (p. 316 of 20 N. J. Super.), and that under such circumstances the defendant could not invoke the rule that in order to be admissible the confession must be shown to have been voluntarily given.

A Federal case in point is *Trowbridge* v. *Pennsylvania*, 112 F. Supp. 356 (D. C. 1952), aff'd 204 F. 2d 689 (3d Circ. 1953). There the defendant pleaded guilty to two counts of a 3-count indictment. On habeas corpus, he claimed that, (1) he had been severely beaten by the police and forced to sign a confession; and (2) he had been "tricked" by his attorney into offering a guilty plea. His contentions were rejected because he failed to sustain his claim of denial of constitutional rights in the habeas corpus proceedings in the State courts, and the record clearly sup-

ported the State courts' conclusion that there had been no denial of his constitutional rights. The Federal court particularly emphasized the point that because of his pleas his confession had not been used against him when it stated (p. 357 of 112 F. Supp.):

> "But even if petitioner had been beaten to extract the confession, he would not be entitled to the writ, for *the confession was not used against him* * * *." (Emphasis supplied.)

The court considered of significance the period of time that elapsed from the time he gave his confession to the time he entered his pleas, as follows (p. 357 of 112 F. Supp.):

> "* * * Also petitioner alleges that he was beaten on April 21, 1951. He was sentenced on June 25, 1951 which is over two months after the alleged beating. Thus any duress which might have been used and we do not find this to be the fact, had ceased before petitioner was taken to court to sign the plea of guilty."

This is how the Court disposed of his contention of "trickery" of his counsel (See notation No. 3):

> "The plea was signed in the presence of petitioner's counsel which further negatives the averment of duress. The allegation that petitioner's counsel tricked him into signing a plea does not raise a federal question. Even if it were true, it would not stamp the sentence as a farce and mockery of justice." (Citing cases).

This was the situation in the instant case. Petitioner was taken into custody on the morning of December 18, 1949. His confession was taken in the afternoon and early

evening of the same day. The following morning, December 19, 1949, at about 11:00 A. M., he was taken before the Magistrate for arraignment on the criminal complaint. At the arraignment he was represented by his counsel and a plea of not guilty entered. It was not until March 26, 1951, more than 15 months after the confession, after his counsel had unsuccessfully undertaken various appeals in the State courts from the trial judge's denial of his request for a pre-trial inspection of his confession, that petitioner retracted his plea of not guilty and substituted a non vult plea to the indictment which was done in the presence of, and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, there was abundant time afforded to petitioner to reflect and understand the nature and consequence of his plea, and that he should not thereafter be permitted to attack the legality of his confession, which was never used against him, by means of habeas corpus proceedings.

U. S. ex rel. Brink v. *Claudy*, 96 F. Supp. 220 (D. C. Pa. 1951), aff'd 194 F. 2d 535, rehearing denied 102 F. Supp. 802, aff'd 200 F. 2d 699, cert. den. sub nomine *Brink* v. *Pennsylvania*, 345 U. S. 930, 73 S. Ct. 792, is a good case in point. There the defendant was arrested without warrant, placed in a cell and held incommunicado and brutally beaten for the purpose of obtaining his confession. It was held that issuance of a writ of habeas corpus was not justified *"where no confession had been received or offered in evidence."* Cases of similar import are *U. S.* v. *Gallagher*, 183 F. 2d 342; *U. S.* v. *Payne*, 183 F. 2d 415, cert. den. 340 U. S. 913, 71 S. Ct. 283; *Holly* v. *Pennsylvania*, 81 F. Supp. 861, aff'd 174 F. 2d 480; *Waley* v. *Johnston*, 139 F. 2d 117, cert.

den. 321 U. S. 779, 64 S. Ct. 617, rehear. den. 321 U. S. 804, 64 S. Ct. 845.

The facts and circumstances of *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 76 S. Ct. 223 (1956), upon which petitioner strongly relies (B. 35), are so strikingly at odds with those in the instant case that the case cannot serve as any advantage to petitioner. There the defendant had never had the benefit of counsel *at any stage of the proceedings*; he was without counsel upon his arraignment, and he was without counsel when he entered his guilty pleas to 30 charges. Further, the prosecuting attorney subjected him to great pressure by demanding that petitioner "sign your name (to the pleas) and forget it." It is most significant, too, that all of petitioner's allegations contained in his petition were *undisputed* by the State.

That is not the situation here. If petitioner had gone to trial and there attempted to attack the legality of his confession the State would have been prepared to show that the confession was given freely and voluntarily and by means of fundamental fairness. But petitioner avoided a trial by pleading nor vult and the confession was never used against him.

At no time did petitioner make any attempt to attack his confession in the State courts. It was not until he instituted habeas corpus proceedings in the Federal District Court that he made an attack upon his confession by claiming it had been extorted by the police. And at the hearing in the District Court the State vigorously disputed his claim by submitting abundant evidence of all of the police officers and prosecuting officials involved to show that the

confession was freely and voluntarily given and that it was procured by fundamentally fair means.

In contrast with the *Herman* v. *Claudy*, case, *supra*, the petitioner in the instant case had the benefit of counsel from the evening of December 18, 1949, immediately following the taking of his confession, throughout every step of the criminal proceedings until he was sentenced on April 18, 1951.

Conclusion.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the Court below should be affirmed.

Respectfully submitted,

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